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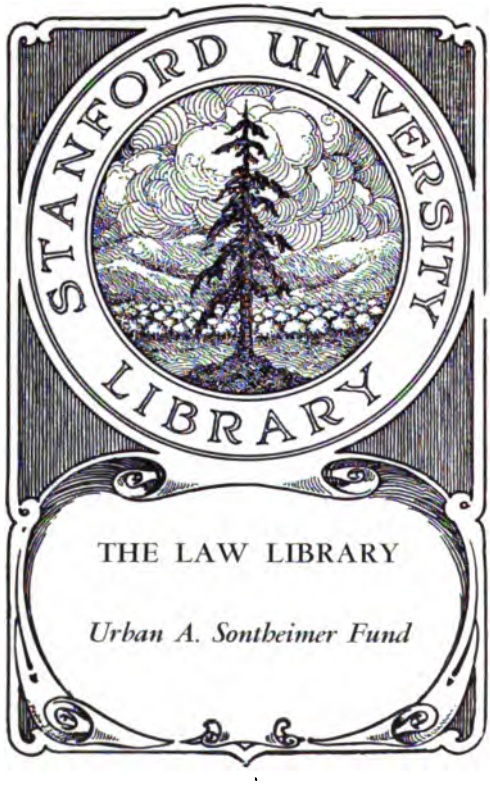

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REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF

THE STATE OF VERMONT.

COMMENCING

WITH THE NINETEENTH CENTURY.

VOL. II.

TO BE CONTINUED.

BY ROYALL TYLER, A. M.
CHIEF JUDGE OF THE SUPREME COURT.

Mens et animus, et consilium, et sententia civitatis posita est in legibus. Ut corpora nostra sine menta, sic civitas sine lege, suis partibus, ut nervis se sanguine et membris. Uti non potest. CIC. PRO CLUENTIO.

NEW-YORK:
Printed and published by I. Riley.
1810.

DISTRICT OF NEW-YORK, ss.

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CHARLES CLINTON,
Clerk of the District of New-York.

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CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, JULY ADJOURNED TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

STEPHEN WINDOVER and JOSEPH HOPKINS,
Appellees,
against
JOHN ROBBINS, Appellant.

An action will lie for the advancing money to a bankrupt, with intent and to enable him to obtain on a credit, merchandise which goes into possession of the lender, although the plaintiff never had any view or even knowledge of the defendant.

THE plaintiffs, as merchants trading in company, declare in trespass on the case, that at the city of *New-York*, on the 27th of *November*, 1795, one *James Robinson* was indebted to them in the sum of 144*l.* 2*s.* 11*d.* *New-York* currency, balance due from said *Robinson*, on account of goods, &c. sold to him. That *Robinson* was then, and ever since hath been, a bankrupt, which was unknown to the plaintiffs, and well known by the defendant. That the defendant conspiring with *Robinson* to defraud the

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plaintiffs, and to procure the plaintiffs to sell to *Robinson* on credit, goods, wares, and merchandise, to the amount of 610*l.* 11*s.* 10*d.* *New-York* currency, did advance *Robinson*, as of his own proper moneys, the sum of 320*l.* of the same currency, with intent that *Robinson* should be able to pay the plaintiffs the sum due to them, and to purchase of them goods to the amount of 610*l.* 11*s.* 10*d.* as aforesaid, the residue of said 320*l.* going in part and prompt payment towards said goods. That the said *James Robinson*, conspiring as aforesaid, on the 20th of *November*, 1795, did, in the said city of *New-York*, apply to the plaintiffs to vend him goods to the amount of 610*l.* 11*s.* 10*d.* and did then and there promise and offer to advance the plaintiffs, in hand, 320*l.* as aforesaid, to pay the above balance of 144*l.* 2*s.* 11*d.* and towards the amount of the goods so to be sold, on condition that the plaintiffs would give credit and a day of payment for the remainder, or balance to be due for said goods, &c. amounting to the sum of 434*l.* 4*s.* 9*d.* of the same currency, equal in value to the sum of 1,086 dols. 84 cts. of the current moneys of the *United States*. Whereupon the plaintiffs, deceived by the conspiracy and fraud of the said *Robbins* and *Robinson*, did sell and deliver to the said *James Robinson*, goods, wares, and merchandise, to the said amount of 610*l.* 11*s.* 10*d.* and the plaintiffs then and there received of said *James Robinson* the said sum of 320*l.* in full discharge and payment of said balance due them upon said former account, amounting to the said sum of 144*l.* 2*s.* 11*d.* and in part payment of said sum of 610*l.* 11*s.* 10*d.* and did then and there credit the said *James Robinson* for the balance then due,

amounting to the sum of 434*l.* 4*s.* 9*d.* as aforesaid, to be paid to them when he the said *James Robinson* should be thereto requested. And the plaintiffs in fact say, that the said *James Robinson*, conspiring as aforesaid, and in pursuance of the fraudulent combination with the defendant as aforesaid, having so received said goods, &c. of the plaintiffs, then and there forthwith delivered the same to the defendant for his the defendant's sole use and benefit, and that the defendant then and there forthwith received the same, and hath converted them to his own proper use. And the plaintiffs in fact further say, that the said *James Robinson* has never since been able to pay to them the aforesaid sum of 434*l.* 11*s.* 10*d.* *New-York* currency, nor any part thereof, although often thereunto requested and demanded. Wherefore the plaintiffs say, that by the fraudulent and deceitful conduct of the defendant, combining and conspiring with the said *James Robinson*, they have been injured, *ad damnum*, 2,000 dollars.

General issue joined, and put to the Jury.

In support of the declaration, the plaintiffs' counsel offered to show in evidence *the confessions of James Robinson to prove the conspiracy.*

The defendant's counsel objected, That *James Robinson* was not a party to the suit; and if he were, his confessions ought not to prejudice the defendant. That if it should be understood to have been the decision of the Court, that *Robinson's* acts or words were admitted in evidence to charge the defendant, it would follow that a plaintiff might hereafter maintain an action for the most aggravated fraud against

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the most honest man, merely by coupling him in his declaration with a villain, and showing the confessions of the latter to charge the former.

In an action of deceit, in nature of a conspiracy, the acts or speeches of an alleged particeps in the fraud cannot be admitted in evidence to the Jury until a privity between him and the defendant is first shown, to the satisfaction of the Court. But when proved, the most liberal latitude will be allowed in showing the conduct and confessions of the particeps.

Sed per Curiam. This is an action of deceit in nature of a conspiracy brought against *John Robbins*, and *James Robinson* is alleged to have been his agent in the fraud. The uniform practice of the Court in similar cases has been, to call upon the plaintiff to show a privity between the defendant and the person coupled with him in the fraud. The Court will decide whether this be sufficiently proved or not. Until it is proved, the confessions or acts of the alleged agent in the fraud cannot be admitted. At present, therefore, the confessions of *Robinson* cannot be shown to the Jury. Let the plaintiffs proceed to prove the *privity*, and when shown to the satisfaction of the Court, the most liberal latitude will be allowed in the proof of the conduct and confessions of *Robinson* as a *particeps*.

On the trial by the Jury, it appeared in evidence,

That on the 27th of *November*, 1795, *James Robinson*, then a bankrupt, was indebted to the plaintiffs 144*l.* 2*s.* 11*d.* *New-York* currency.

That in *October* preceding, the defendant, then an inhabitant of *Rutland*, observed to Messrs. *Willoughby & Miller*, that he could procure goods at ten shillings on the pound, if *he dared to risk somebody*. When requested to explain, he said, after some hesitation, perhaps it is by letting a man have money to establish a credit at the different banks.

That in *November*, 1795, the defendant and *James Robinson*, long known to the former as a bankrupt,

went to the city of *New-York* in company. The defendant there told a witness that he had concluded to let *Robinson* have 1,500 dollars, and that he was to have 100*l.* as a premium, and double the amount in goods as his security.

On the 27th of *November*, 1795, *Robinson*, by advancing to the plaintiffs 320*l.* *New-York* currency, extinguished the debt of 144*l.* 11*s.* 2*d.* then due, and the balance was passed to his credit on amount of goods and merchandise sold and delivered to him at that time, the invoice of which footed at 610*l.* 11*s.* 10*d.* and after deducting the credit, balanced in favour of the plaintiffs, 434*l.* 4*s.* 9*d.*

The goods were packed, and the bales marked *J. R.* Before they were removed, a bill of sale from *Robinson* to the defendant was endorsed upon the invoice. When the bales were shipped, they were delivered to the defendant, who with chalk, to the initials of *J. R.* added *obbins.* They were conveyed by the defendant to *Clarendon*, *Rutland* County, and exposed for sale in a store occupied by *Robinson* ostensibly as his property; but the defendant officiated as his clerk.

A dispute soon happened between *Robinson* and the defendant on account of the former paying sundry debts from these goods. In their altercation the defendant stated the contract between them, viz. "that he and his horses were to be at the service of *Robinson* from *October*, 1795, to the *May* following; that he was to receive 100*l.* lawful money, and to have goods pledged for his security; that he had advanced 1,500 dollars; and they had further agreed that the goods purchased by *Robinson* in *New-York* from the plaintiffs and others, amounting in value, at

Windover and Hopkins v. Robbins

the *New York* prices, to upwards of 6,000 dollars, should be pledged with him; conditioned, that if *Robinson*, by the 20th of *May*, 1796, paid the 100*l.* and repaid the 1,500 dollars, with all expenses and incidental charges, he was to surrender his lien on the goods; otherwise they were to become his absolute property." *Robinson* did not deny the contract, but complained that it was a hard bargain. An accommodation then took place. The defendant gave *Robinson* 500 dollars, who relinquished all claim on the goods. The defendant took them into possession, and converted them to his own use. *Robinson* the next day absconded the State.

The only points in defence were,

That as the plaintiffs, during the whole transaction, never had any view or even knowledge of the existence of the defendant, it could not be intended that they parted with their property through any reliance upon him.

That the defendant's loaning money to *James Robinson*, to buttress his declining credit, so far from being a fraudulent, was a lawful and meritorious act; that this was frequently done by the fairest merchants, and often operated a substantial benefit to creditors by saving a failing trader from bankruptcy. In support of this the defendant's counsel cited 2 *Burr. Rep.* p. 933. *Foxcraft et al. Assignees of Satterthwaite, bankrupt*, v. *Devonshire et al.* wherein Lord *Mansfield*, in delivering the opinion of the Court of King's Bench, observed: "A notion, 'that lending money to traders, knowing them to be in dubious, tottering or distressed circumstances, upon mortgages or *liens*, is fraudulent, and consequently the contract void in case a bankruptcy ensues,' would

throw all mercantile dealing into inextricable confusion. Men lend their money to traders upon mortgages or consignment of goods, because they suspect their circumstances, and will not run the risk of their general credit."

TYLER, Assistant Judge, in charge to the Jury, laid it down as settled, that where *A.* and *B.* combine to defraud *C.* of property, and it is carried into effect, though *A.* should keep concealed from *C.* during the whole transaction, and *B.* should be the active partner in the conspiracy, yet the fraudulent combination being proved to have existed between them, *A.* shall be charged in damages; for it may appear that the *summa ars* of the covin was to secret *A.* from the knowledge of *C.* An adverse doctrine would lead to the conclusion, that the grossest fraud might be practised and fully proved in our courts of justice, and the law be found inadequate to relieve. But the arm of the law is not shortened, that it cannot save, and courts and jurors will with eagle eyes trace fraud through all its secret and crooked paths, and render both the agent who appears, and the prime mover who plots in darkness, amenable.

The case cited from *Burrow*, addressed to the Court, but read in presence of the Jury, he declared to be not in point.

The defendants in that case had honoured certain bills and drafts made upon them by *Satterthwaite*. Afterwards, effects of this bankrupt came into their possession by his assignment, which they sold and converted into money; and the question was, whether this money should become the trust property of his assignees, or go to remunerate the defendants for

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the bills and drafts they had accepted and paid. It appears, that these bills and drafts were accepted and paid by the defendants before the commission of bankruptcy, which was in *August*, 1752.

The defendants were to receive merely the amount of what they had advanced with the customary commissions. Some secret acts of bankruptcy committed by *Satterthwaite*, about *Christmas*, 1751, were attempted to be proved by the plaintiffs, which "overreached the consignment of the goods, the sale of them, the receipt of the moneys for which they were sold, and likewise the time when the defendants advanced the moneys to the use and order of the bankrupt;" and the fraud attempted to be charged upon the defendants was this, "that they were privy to *Satterthwaite's* insolvency, at the time when they advanced the money to discharge his bills." But all this was done away by counter proof; it appearing, that if any of these secret acts of bankruptcy existed, they were done away by his again appearing publicly as usual, and continuing so to do, until *August*, 1752, when he stopped payment, and the commission was taken out.

If such secret acts of bankruptcy in *Satterthwaite* had been proved, and within the knowledge of the defendants, it is probable the decision would have been adverse, and the transaction amounted to a fraud in law, at least; or if the consignment of the goods, the sale of them, the receipt of the moneys for which they were sold, and likewise the time when the defendants advanced the moneys to the use and order of the bankrupt, had all been subsequent to the taking out of the commission of bankruptcy, the question must have turned upon the validity of

payment, under the act of 19 *Geo.* II. c. 32. without noticing several other points mooted by the learned counsel. The question decided in that cause was simply, whether payment of bills to support the credit of a declining trader, without notice of bankruptcy, be fraudulent.

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We should not consider it so here, for the law should always aid rather than discountenance the social virtues.

But does the case, or the reason of the decision, apply? Here is a premeditated *fraud in fact*, of the grossest nature, alleged.

It is in proof that the defendant *Robbins*, a few weeks before the plaintiffs vended their merchandise to *Robinson*, declared his intention of defrauding *somebody*. He said he could obtain goods at half their real value. He detailed his iniquitous scheme, which was by loaning money to some one who might thereby obtain a credit. He did not indeed say he intended to loan to a bankrupt, but he described him as an unresponsible man; for he added, "if he could venture to trust somebody."

He had been long and familiarly acquainted with *Robinson*, and knew he was bankrupt. He accompanied him to *New-York*. He advanced him 1,500 dollars, part of which money it is not contended was paid by *Robinson* to the plaintiffs, and was the inducement for them to give him a credit to a large amount. Before the goods purchased by *Robinson* were removed from the plaintiff's store, this defendant took a bill of sale of the whole invoice. When the property is shipped, the defendant takes it into his possession, and marks his name upon the packages. Under his care the goods were transported to

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Clarendon. They were, it is true, exposed to sale in the store occupied by *Robinson;* but the defendant officiated as clerk, and evidenced his interest in and control over the property, by restraining his ostensible principal from applying any part of them to the payment of his debts. A dispute happened, and terminated in a final accommodation, by which *Robinson*, in consideration of 500 dollars, relinquished his claim to the whole merchandise in the store, which included not only the goods purchased of the plaintiffs, but other goods to the amount of more than 6,000 dollars, obtained by *Robinson* in the same mode and time from others. The defendant took possession of the whole, and *Robinson* immediately absconded.

Does the case read from the *English* authority apply? By advancing money to *James Robinson*, was the defendant engaged in the laudable business of loaning his money to support the credit of a declining trader without notice of any act of bankruptcy?

Verdict for the plaintiffs, 1,556 dols. 58 cts.

Darius Chipman and *John Cook*, for plaintiffs.

Cephas Smith, *Chauncey Langdon*, and *Smith & Prentice*, for defendant.

Robbins v. Windover and Hopkins.

JOHN ROBBINS
against
STEPHEN WINDOVER and JOSEPH HOPKINS.

MOTION for new trial.

The defendant in the preceding cause moved for a new trial; stating,

First. That some of the Jurors of the Jury who tried the cause, after the cause was submitted to them, witnessed or related to others of the panel certain matters and things in relation to the issue not witnessed or related on the trial of the cause in Court.

Secondly. That since the trial of the cause he had discovered *new*, and as he is advised, material evidence.

In support of the first point,

Chauncey Langdon, for defendant, offered to read the affidavit of one of the Jurors.

To the reading of this affidavit an objection was taken.

Langdon cited 1 *Wils. Rep.* p. 329. *Rex* v. *Simmons*, a Jew; and 1 *Burr. Rep.* p. 383. *Cogan* v. *Ebden and another.*

Darius Chipman, for plaintiffs, read, *as advisory*, *Leib* v. *Bolton*, from *Dallas's Pennsylvania Reports.**

After hearing argument, the Court said they would take time to advise on this exception, and directed

When an action of fraud is brought against *A.*, and *B* is coupled with him in the declaration as a particeps, it is not material to the general issue to show in defence that the plaintiff had no knowledge of the defendant, and was not *immediately* defrauded by him, and therefore the exhibition of such evidence by affidavit, though newly discovered, is no ground for a new trial.

On motion for a new trial in a *civil cause*, the affidavit of one of the panel who tried it cannot be read to show what passed in the jury room during the deliberations of the jury while agreeing to their verdict.

* This case may be found 2d edit. vol. 1. p. 83.

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the defendant's counsel to proceed in support of his second cause for a new trial.

The counsel read the affidavit of *Paul Rogers*, upon which he principally relied, which testified, that some time after the institution of the suit of *Windover and Hopkins* v. *John Robbins*, and while the same was pending in the County Court, he was in the store of the plaintiffs in *New-York*, and heard them in conversation upon the subject of the suit, and either *Windover* or *Hopkins* said " they did expect to recover in the suit, although they did not deliver the goods upon the credit of *Robbins*, or upon any thing that *Robbins* had said or done within their knowledge; for they had delivered the goods to *Robinson* upon his credit only; but from information since the delivery of the goods, they hoped to be able to prove, that *Robbins* had some how or other been concerned with *Robinson* in partnership.

Upon the sixth day of the term,

TYLER, Assistant Judge, the Chief Judge being absent, delivered the opinion of the Court.

The defendant rests his motion on two grounds: The first is, that certain Jurors of the panel who tried the cause, witnessed or related certain matters and things in relation to the issue, to others of the panel after the cause was submitted to them, not witnessed on the trial of the cause in Court.

It may be observed here, that it is not alleged that these matters and things had any effect in determining the verdict; and the Court will not in any case set aside a verdict by intendment, where it appears that substantial justice has been done. But the previous question, whether the affidavit of one of the

Jurors shall be admitted to show what passed during the investigation of the cause in the jury room, renders any further observation upon what would have been the effect of such testimony if admitted, unnecessary.

Upon the point in question, the Court are decidedly of opinion, that the affidavit cannot be admitted to be read.

The common law requires, that the twelve Jurors shall unite in a verdict. Whoever considers the variety and intricacy of causes they have to determine, the difficulty of bringing twelve persons of different habits and modes of thinking, and of unequal abilities, fortuitously elected, to concur in opinion, will perceive the wisdom of the Legislature in directing that their deliberations should be secret; for it was to be expected, that in bringing about a union of sentiment in the panel, the subject under consideration would be presented in various lights; that futile objections would be met with inconclusive arguments, theory opposed to practice, and legal science to common sense; that the reputations of witnesses would be scanned, the character of parties too often adverted to, and the whole investigation illustrated by relations of what each Juror had heard or known in cases supposed similar; that the warmth of debate would excite an obstinacy of opinion, and a reluctant and tardy assent to the verdict, perhaps drawn from some one which, on after reflection, might leave in the Juror's mind a doubt of its rectitude.

It would be of dangerous tendency to admit Jurors by affidavit to detail these deliberations of the jury room, to testify to subjects not perfectly comprehended at the time, or but imperfectly recollected.

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From a natural commiseration for the losing party, or a desire to apologize for the discharge of an ungrateful duty, after the Juror had been discharged from office, he would be too apt to intimate, that if some part of the testimony had been adverted to, or something not in evidence omitted, his opinion would have been otherwise, whilst others of the panel, with different impressions or different recollections, might testify favourably for the prevailing party. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated.

The Court consider it to be far better to establish it as a general rule, that the affidavits of Jurors respecting the deliberations which led to their verdict, should in no civil cause be admitted; and they are confirmed in this opinion from the consideration of the provisions made by the Legislature to rectify improper verdicts.

If the verdict be contrary to law, the Court can grant a new trial.

If it is against evidence, the Court can send the Jury to a second and third consideration, stating the true points in the cause, detailing and applying the evidence, and affording them the light of their opinion which way the verdict ought to incline.

From the lower Courts an appeal lies. In this Court the cause may be reviewed where the verdict is not final; and when it is, the Court, in furtherance of justice, will be very liberal in granting new trials on application supported by *other testimony*.

We learn by the cases cited from the books, and from others within the recollection of the Court, that the *English* Judges consider the admission of-

such affidavits as not common, and of dangerous tendency.

The case of *Simmons*, the Jew, cited from *Wilson's Reports*, shows the caution with which the Judges of the Court of King's Bench, admitted the affidavits of petit jurymen. The ground of setting aside the verdict was not the exposition by affidavit of any *improper deliberations of the Jury*, not upon the affidavits of the Jury only, but because it was a criminal case, and that the verdict taken in Court was a mis-entry, as appeared by the affidavit of the foreman and all his fellows, supported by the declaration of Judge *Foster*, who presided on the trial at *Nisi Prius*.

In delivering his opinion, *Lee*, Chief Justice, said, " There is no doubt but a new trial may be granted in a *criminal* case, and the true reason for granting new trials is for the obtaining of justice: but to grant them upon the affidavits of jurymen only, must be admitted to be of dangerous consequence. It appears from the *report* of my brother *Foster*, and the affidavit of *Dodson* the foreman, that this verdict was taken by *mistake;* for he swears that he declared in Court, " that they did not find the defendant guilty of any intent," and therefore this is not granting a new trial upon any AFTER-THOUGHT of the Jury, but upon what the foreman *Dodson* declared at the bar when they gave their verdict."

Wright, Justice, observed, " My brother *reports*, that he told them, if they did not believe the intent they must acquit him. The Jury now swear, " they did not hear him." Therefore I am of opinion that it is a verdict *mis-entered*, contrary to the declaration of the foreman, not contradicted by any of the rest

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at the time it was spoken at the bar; and that it is most plainly no *after-thought;* so that we may keep clear of the danger of granting new trials merely upon the *affidavits of jurymen.*"

Denniston, Justice, added, "The Court will be very cautious how they grant new trials upon the affidavits of jurymen, because it would be of very dangerous tendency; but in this particular case, which *partly depends on my brother's report, and partly on the affidavits of all the jurymen*, I am very well satisfied, there ought to be a new trial, because it appears, both by the *report and affidavits*, that this verdict ought not to stand."

The case of *Cogan* v. *Ebden and another*, cited from *Burrow's Reports*, exhibits no decision.

It appeared, upon investigation, and recurrence to the reporting Judge's minutes, that there was a mistake, a mere slip in the verdict; and upon suggestion of Lord *Mansfield* to Mr. *Morton*, the plaintiff's counsel, he moved for a rule upon defendant to show cause why, upon reading the affidavits of eight of the jurymen, the verdict should not be amended and set right, according to the truth of the finding. The rule was granted, *but it never came before the Court any more.*

But whatever may have been the opinions of the *English* jurists on this point, the Court consider that the mode of our trials affords so many opportunities for a losing party to have his cause reconsidered by Court and Jury, unknown in the mother country, that the reasons operative there, if any exist, for the admission of affidavits of jurymen, exhibiting the deliberations of the jury room, cannot apply here.

The case of *Leib* v. *Bolton*, cited from *Dallas's Reports*, decided in the Common Pleas, *Philadelphia* County, *Pennsylvania*, under the Presidency of the late venerable and learned Chief Justice *Shippen*, though read as advisory, has weight. It shows a coincidence of opinion in the Judges of a State eminently respectable for its jurisprudence, administering a municipal code of near affinity with our own.

The affidavit of the jurymen cannot therefore be read in evidence, and consequently the defendant cannot rest on the first ground of his motion.

Any reliance upon the affidavits of *Abel Spencer* and *Joseph Randall* being abandoned by the defendant's counsel, it remains only to be considered whether the subject matter of the affidavit of *Paul Rogers* be a sufficient ground for a new trial.

In order to obtain a new trial upon the exhibition of further testimony,

First. The evidence must have been discovered by the party subsequent to the trial.

Secondly. It must be material to the issue tried.

The time this evidence came to the defendant's knowledge has not been made to appear; but this is of small import, as the Court consider the evidence exhibited in the affidavit as totally irrelevant and immaterial to the matter lately in issue. It only goes to show, that the plaintiffs had no knowledge of *Robbins* during the transaction by which they were defrauded, and were not induced by his personal application to part with their property on credit to the bankrupt, and that they relied upon maintaining their action lately tried.

That the defendant was to keep concealed both as to acts and words from the plaintiffs' knowledge,

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appears to have been within the scheme and essence of the fraud.

On the trial, no reliance was had by the plaintiffs on any acts or speeches of the defendant, as applied immediately to them; but the fraud complained of, and the injury sustained, was *mediately* through *James Robinson.*

On the other hand, reliance was had by the defendant's counsel upon the circumstance, that as the plaintiffs, during the whole transaction, never had any view or even knowledge of the existence of the defendant, it could not be intended that they parted with their property through any reliance upon him. It was conceded by the plaintiffs that they had no such knowledge, and the defendant's counsel urged it in argument to the Jury.

As the Judge who charged the Jury expressed himself very fully upon this point, it was not apprehended that any further attempt would be made to attach this extraneous position to the cause. This repeated aberration in the counsel has manifestly arisen from confounding an action for fraud with an action upon a warranty. In the case of goods vended upon the express warranty of the ability of the purchaser by a third person, some privity of contract must be shown between the vendor and warrantor; but in cases of fraud it is not necessary to show any privity between the person defrauded and the principal in the fraud.

In this case *Robinson* was indebted to the plaintiffs, and was a bankrupt. He appeared at their store in a character every way the reverse. He was not only able to cancel their existing demand, but was able to deposit a considerable sum of money as prompt

and part payment for a new invoice of goods. The plaintiffs, deceived by his apparent opulence, gave him credit for merchandise to a large amount, which he eloigned. They have now discovered the person who furnished this bankrupt with the means of deception, and they have traced their eloigned goods into his possession. It was manifestly part of the fraudulent design of the defendant to keep out of view of the plaintiffs. He might know or apprehend that his appearance might defeat the plan, entangle him as a *particeps* or warrantor, or at least draw the attention of the plaintiffs to some clew by which they might discover the place where the spoil was to be divided. Shall the defendant now say to the plaintiffs, " I have defrauded you. I have your property in my possession. You have exposed my fraud to the satisfaction of both Court and Jury; but as part of my plan was to keep from your view and knowledge, if the Court will afford me an opportunity to show, upon a new trial, that I have, by your own confession, succeeded in this part of my fraudulent scheme, I shall escape with impunity." Surely such showing would be inadmissible.

The subject matter of the affidavit of *Paul Rogers* cannot therefore be considered as material to the issue; and the defendant cannot take any thing by his motion.

Motion dismissed, with costs.

Langdon, for defendant.
Darius Chipman, for plaintiffs.

Hawley v. Clerk and Hazletine.

ABNER HAWLEY
against
GARDNER CLERK and JOHN HAZLETINE.

In an action of trespass *vi et armis* for an injury done to personal property, if the plaintiff describes the *locus in quo* in his declaration as a close, and alleges a breaking and entering and doing damage, if he does not set forth a seisin or possession of the close in any one, this shall be considered as mere *surplusage*, and the declaration will on demurrer be held good, if without this it contains sufficient to sustain an action of trespass *vi et armis* for a chattel injury.

THE plaintiff declared in a plea of trespass *vi et armis*.

Whereupon the plaintiff declares and says, that the defendants, on the 13th of *October*, A. D. 1800, at *Wallingford*, *Rutland* County, with force and arms, *broke and entered* a certain close or lot of land in said *Wallingford*, on which *Jonathan Streater* lately lived, called the *Streater Farm*; and having so entered as aforesaid, with like force and arms, *picked* and carried away about thirty bushels of good Indian corn, then and there standing on said close, being the property of the plaintiff. And the defendants having so entered as aforesaid, on the day and year last aforesaid, in like unlawful manner as aforesaid, without law or right, did take and carry away out of said close about twenty shocks of oats, and about two tons and a half of hay, all the property of the plaintiff, *et alia enormia contra pacem*, *ad damnum*, 100 dollars.

Special demurrer, that the suit is an action of trespass on the freehold; and that the close pretended to have been broken, and in which the said pretended trespass is therein complained of, is not in the declaration described as the property, or to have been in possession of the plaintiff. Joinder.

John A. Graham, in support of the demurrer. There is a distinction found in the books between

an injury done to *personal* and to *real* property. When an injury is done to the former, the person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring of the chattel by a stranger, although he never had a possession thereof in fact; for a general property always draws to it a possession in law, which is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found this action upon; but where the injury is done to real property, *only the person who has the possession in fact* of the real property, can maintain an action of *quare clausum fregit*, a general property not being in the case of real property, as it is in personal, sufficient to found this action upon.

Bac. Abr. vol. 6. p. 562. 566.

The present declaration is an action of trespass on the freehold, for an injury especially done to the land, to wit, *breaking and entering the close, and picking and carrying away thirty bushels of Indian corn, then and there standing.* But the plaintiff has not alleged that he was in possession, or even had a title to the estate. All the books of entries, exhibiting declarations, show the form of them as stating the seisin and possession to be in the plaintiffs. I have in my hand the third volume of Lord *Raymond's Reports*, containing the entries of pleadings to the cases comprehended in the two former volumes. In page 113. we have a declaration in trespass for breaking and entering the plaintiff's close. "*William Peckham*, late of *Rumboldswick*, in the County aforesaid, gentleman, and *John Peckham*, gentleman, of said *Rumboldswick*, were attached to answer unto *Stephen Neville*, of a plea wherefore with force and arms *the close of him* the said *Ste-*

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phen Neville, at the parish of *Rumboldswick*, they broke and entered, *and his grass*, to the value of forty shillings, there lately growing, with their feet in walking they depastured, trod down, and consumed." So we shall find the whole current of *English* forms. So we have always declared in this State. For every plaintiff, to make out his case, must not only show in his declaration that he has been injured, but that he has a legal right to complain in the mode he has elected. Now what right has the plaintiff shown in his declaration, that he has to complain of the defendants' breaking and entering the close of *Jonathan Streater?* Does he appear as *amicus curiæ?* or is it true that the age of chivalry is not gone, and that the plaintiff is to be countenanced like a gallant knight, to ride through the land as the redoubtable redresser of others wrongs.

Daniel Chipman, e contra. Although we acknowledge that the declaration is rather unskilfully drafted, yet we consider it to be sufficiently explicit to sustain the action.

There can be no doubt that an action of trespass *vi et armis* will lie for unlawfully taking property on the land of another; and it will appear, by inspection of the declaration, that this is the ground of the plaintiff's plaint. The plaintiff intended to state, that on the 13th of *October*, 1800, the defendants with force and arms took and carried away from his possession, thirty bushels of Indian corn, twenty shocks of oats in the stock, and two tons and a half of hay. As he esteemed it necessary to allege a *venue*. He meant simply to state, that the trespass was committed at a place called the *Streater Farm*, in *Walling-*

ford. In doing this he has inadvertently described the place as a close, and alleged that the defendants broke and entered it. He has not set forth any title or possession of the close in *Streater;* for it is described as "the close or lot on which *Jonathan Streater* lately lived," called the *Streater Farm;* nor has he alleged any seisin or possession of the close in himself, which he would have done had he intended an action *quare clausum fregit.* This circumlocutory description of the place where the trespass was committed, by taking his property, must therefore be considered as *mere surplusage;* for without this the declaration is well laid for an injury to personal property. The ground of the action of trespass *vi et armis,* for an injury to personal property is, that the plaintiff was in possession of chattels, and that the defendant have devested him of them, contrary to law. All this is sufficiently set forth in the declaration.

Samuel Walker, in reply. The very ingenious gloss our learned opponent has given to the declaration in question, is the first intimation we have received that the plaintiff complains of a mere chattel injury. We are charged with breaking and entering a close, with *picking* and carrying away his Indian corn; which appears by the phrase *picking* to have been attached to the freehold. It is true we are further charged with taking and carrying away certain personal property; but this is commonly alleged among the *alia enormia* of the declaration *quare clausum fregit.* But it is said, that it is not alleged that the seisin or possession of the close was in any one. We had never imagined the declaration to be per-

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fect, and therefore we demurred, and especially set down this defect as our cause of demurrer.

But it seems that the description of the close, the breaking and entering and destroying the crop, those prominent features in an action for trespass on real property, are now attempted to be considered as mere surplusage.

We understand a surplusage in law to be like the pleonasm in rhetoric, which consists in the use of superfluous words; words which convey ideas already expressed; words not contradictory or repugnant to the text, but *unnecessary*. The belles lettres critic will purify his style from such verbiage. In law we have likewise a pleonasm, called a surplusage, which also consists in the use of superfluous words. These are not, however, to be expunged, as the law cannot descend to the petty purities of style; but they are to be considered as inadvertently used, and to pass for nought. The law has, however, allowed some words which are not mere pleonasms to be considered as surplusage; as when the plaintiff alleges an impossible thing, or states a thing imperfectly which need not have been mentioned, or omits any words, though not repugnant to the preceding words, by which what was insensible is made sensible.

Of this surplusage we have many examples in the books.

If the plaintiff declares, *quod cum ipsi idem def.* &c. this shall not be bad, for *ipsi* is surplusage. 2 *Mod. Ca.* 377.

If a trespass *temp. Eliz.* be alleged to be *contra pacem nup. reginæ, et regis nunc*, it is not bad; for

regis nunc shall be surplusage. *R.* II. *Cro.* 377. 3 *Bull.* 82.

In the case of *Dorney* v. *Cashwood*, *B. R.* 1 Lord *Raym.* p. 266. we have, besides the principal case, several instances of surplusage quoted by the learned Judges; which, with the numerous cases cited in the margin, puts this doctrine of surplusage on its true ground. It appears, that although great allowance is made for prothonotarial blunders, yet a plaintiff must not presume on this so far as to encumber the record with allegations or recitals which show that he has no cause of action. He cannot in such cases excuse himself by saying all this is surplusage. Therefore we read, that if a man, by the allegation of a thing not necessary, shows that he has no cause of action, this, though surplusage, shall hurt; as in assise, if the plaintiff makes a title which he need not, and the title is not good, the whole shall abate. *Com. Dig.* vol. 5. 342. tit. *Pleader*, c. 29.

So if a man misrecites a statute in a material place, when it need not have been recited, it is fatal. Ib. and *Pl. Com.* 84. b.

In the present case, the plaintiff has declared that we have trespassed by breaking and entering a certain close, described as known by the name of the *Streater Farm* or *Lot*, and there done injury to the freehold by picking Indian corn thereon standing. We demur because he has not shown any interest in the close. If he had alleged any seisin or possession, a legitimate defence would have been seisin, possession, or right of entry in us. Shall we now be told, although you may have prepared and relied on such defence, all that I have alleged respecting

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the breaking and entering the close, and doing damage to real property, is mere surplusage; for I complain only of a mere chattel injury. Will the doctrine of surplusage, as laid down in the books, justify this? We would inquire, what is the intent of the declaration? Is it not that the defendant may be informed specifically of the nature and extent of the plaintiff's claim, that he may be prepared to confess it by default, or meet it by defence. That a party who may be summoned or attached to answer in our courts of justice, may be well ascertained of the nature and extent of the plaintiff's claim, our Legislature have wisely provided, that the declaration, filed in Court by the *English* practice, should accompany the process by which he is cited to appear and answer to it, and that the service should be made at least twelve days before the session of our higher courts; but to carry the doctrine of surplusage so far as is contended for in the present case, would defeat the designs of the Legislature; for it would be of little import to a party to have the copy of a declaration which could only mislead him as to the nature of the action.

If this is not surplusage, it seems conceded by our opponent, that the declaration is insufficient in omitting to allege, that the seisin or possession of the close was in the plaintiff, and our demurrer must prevail.

The Chief Judge delivered the opinion of the Court; *Tyler*, Assistant Judge, *dubitante.*

The plaintiff declares in trespass *vi et armis*, for that the defendants, on the 13th of *October*, 1800, with force and arms broke and entered a certain

close or lot of land in *Wallingford*, on which *Jonathan Streater* lately lived, called the *Streater Farm*, and having so entered, with like force and arms picked and carried away about thirty bushels of Indian corn then and there standing, being the property of the plaintiff, and also with like force took and carried away out of said close about twenty shocks of oats in the stack, and about two tons and a half of hay, also the property of the plaintiff.

To this declaration the defendant demurs specially in substance, that it does not set forth any seisin or possession of the close in the plaintiff, and he contends, that the plaintiff hath not therefore shown any right of action.

It is very clear, that if this declaration is to be considered as in trespass *quare clausum fregit*, it is defective. But the plaintiff avoids this by insisting, that the allegation of breaking and entering the close is merely surplusage, and on this point the demurrer must be decided.

It appears to the Court, that there is sufficient in the declaration to sustain an action of trespass for an injury done to personal property. The claim of the plaintiff could not have been misapprehended by the defendants. He has not alleged the seisin or possession of the close to have been in him or any other person, but he has alleged the property of the chattels to be in himself. The declaration is sufficient for an injury done to personal property, or it is nought. The mistake seems to have been made in describing the *locus in quo*, where the trespass was committed. The Court are not inclined to quash declarations under which justice may be done. The declaration is untechnically drawn, and a motion for

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interest, should operate as a strong reason to the contrary. If a person interested in a cause has thoughtlessly testified, he may still, as a candid man, or as one under fear of the injunctions of his oath, testify to the truth; but when a man perjures himself in the outset—when particularly interrogated on the *voir dire*, and the subject brought home to his memory and conscience, he swears, that he is not interested in the event of a cause, although he knows that he is; certainly there is every reason to conclude, that a person thus circumstanced would be biased by the same interest to perjure himself when testifying in chief.

Daniel Chipman, for defendant, cited 1 *Durnf. & East*, p. 717—720. *Turner and others* v. *Pearte*, and 4 *Burr. Rep.* p. 2251—2256. *Abrahams, qui tam*, v. *Bunn;* and was proceeding to apply the doctrine therein laid down, but was interrupted by the Court.

Per Curiam. By our practice, when a witness appears on the stand, who is considered to be interested in the event of a cause, a party may prove his interest by written or unwritten testimony. He may show by documents, or by other disinterested witnesses, that he is interested, or he may appeal to the conscience of the witness by having the *voir dire* oath administered to him. The party has his election to do either, but *he cannot do both.* If the witness perjures himself by testifying that he had no interest, when he knows he has, he is amenable for the perjury; but if he purges himself from interest, the opposing party must rest satisfied. He has put the question of interest upon the witness's con-

science, and he shall not be permitted to proceed virtually to try the witness for perjury. This would create a useless altercation, and impede and devest the trial of the cause; for it is to be observed, that while the question whether the witness be interested or not is tried by the bench, the trial of the cause in issue to the Jury is suspended. The opposite party is not, however, without remedy. During the trial, if the witness perjures himself on the *voir dire*, his admission only establishes his competency. The party may still lessen or entirely do away his credibility, by showing that his character for truth and veracity is bad, or by counter proof may invalidate his testimony.

It appears from the books, that anciently the *English* courts were so strict, that after a witness had been sworn in chief, they would not admit the *voir dire* oath to be administered to him. This strictness has in more modern cases been greatly relaxed. In *England*, as well as here, after the witness has been sworn in chief, and partly examined, the Court, upon suggestion of his interest, will permit the party to show it by administering the *voir dire*, or by other proof.

If our undeviating practice is founded in reason, surely it ought not to be contended, that when the Court uniformly drive a party to his election of either mode to prove the interest of a witness, and confine him strictly to the one he has elected *during the trial*, that he may elect the *voir dire*, and be confined to it during the trial *per pais*, and on motion for a trial *de novo*, come forward with the other mode of proof; for if it is reasonable that the party should avail himself of both modes of proof, it would be more rea-

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sonable that he should have this benefit of them during the trial; for if the result should be the exclusion of the witness, the delay and costs of a new trial had better be saved.

The Court, therefore, consider, that when a party on trial to the Jury has elected to prove the interest of a witness by causing the *voir dire* to be administered to him, he shall not, on motion for a new trial, be admitted to show the interest of the witness by other proof, and therefore that the plaintiff take nothing by his motion.

Motion dismissed with costs.

Cephas Smith, junior, and *Samuel Prentice*, for plaintiff.

Daniel Chipman, for defendant.

JOEL DICKENSON *against* THOMAS GOULD.

When a plaintiff in an action of book account, demands a *certain sum* in his declaration which is found to be due to him, the Court, in rendering judgment, may *add* the interest accruing from the time the account became payable to the time it was liquidated by the judgment.

When an action of book account, originally commenced before a justice of the peace, comes by appeal to the County Court, and defendant is defaulted, the Court are not restricted to appoint an auditor or auditors, as they would be if the action had been brought originally before them, but may in their discretion audit the account by *themselves* or by another or others, under the provision of the 54th section of the judiciary act.

IN ERROR. This writ was brought to reverse a judgment rendered by *Rutland* County Court, *November* term, A. D. 1800.

It appeared by inspection of the record, that *Thomas Gould*, the original plaintiff, now defendant, impeached the present plaintiff in error before a Justice of the Peace in an action on book account, demanding

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18 dols. 18 cts. to balance book accounts. The Justice's Court rendered judgment in favour of *Dickenson*, from which judgment *Gould* appealed to the County Court, entered his appeal, and after several imparlances, *Dickenson* suffered a default. The County Court rendered judgment in favour of *Gould* for 19 dols. 57 cts. damages and costs.

The errors assigned *inter alia* not insisted upon, are,

First. That the County Court had rendered judgment for the then plaintiff, 19 dols. 57 cts. when he alleges in his declaration, the balance of book accounts in his favour to have been only 18 dols. 18 cts.

Secondly. That the County Court, upon the defendant's being defaulted, did not appoint an auditor or auditors to examine and adjust the accounts between the parties.

Oyer of the record craved and exhibited. *In nullo est erratum* pleaded, and joinder.

Langdon, for plaintiff. Our first exception in error is, that the judgment rendered for the original plaintiff exceeds the sum demanded in the declaration 1 dol. 39 cts. This is a small sum, but it is included in the principle, that a plaintiff may recover less, but never can recover greater damages than he has demanded in his declaration. If the County Court have the power to augment the sum set forth by the plaintiff to be his due one dollar and thirty-nine cents, they possess power to increase it to any extent. In actions on the case, the defendant learns from the declaration the extent of the plaintiff's claim. If he considers it exorbitant, or entirely

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without foundation, he will prepare to contest it in Court: but if he considers the plaintiff's claim to be just, and the sum demanded by him as correct, he will suffer a default, resting in full confidence that judgment cannot be rendered for any greater sum than that demanded in the declaration. The plaintiff always takes his judgment at his peril. If the cause is tried by the Jury, and they find a greater sum in damages than the plaintiff claims in his declaration, he may enter a *remittitur* for the excess. If he fails to do this, the defendant may move for and shall have a new trial, or he may bring his writ of error as in the present case, and reverse the judgment.

In an action of book account, which must be considered here as a creature of the statute law, the Legislature have provided a further security, that the defendant shall have no greater sum rendered against him, even *on default*, than the plaintiff hath set forth to be his just due, by allowing him a day, and a board before whom he may appear and contest the plaintiff's claim; and this brings us to the consideration of our

Second exception in error, to wit, that the County Court erred in rendering judgment against us upon default, without appointing an auditor or auditors to examine and adjust the accounts between us and the plaintiffs.

Vermont Stat. vol. 1. p. 256. passed *Feb.* 23, 1797.

The act relating to actions of account, first section, provides, "That when any defendant or defendants, in any action of account pending in any Court in this State, shall plead in defence any plea, (which, being true, he, she, or they ought not to account,) it shall be tried by a Jury, and if a verdict be found against him, her, or them, the Court shall render judgment

that he, she, or they account; and in such case, and also when such judgment shall be rendered on confession *or default*, the Court *may* appoint one or more judicious and disinterested men auditor or auditors in the cause, who shall be sworn to hear, examine, and adjust the account or accounts, and such auditor or auditors are hereby authorized and empowered to appoint a time and place for hearing, examining, and adjusting the accounts aforesaid, and upon the defendant or defendant's refusal (due notice being given to him, her, or them, of the time and place appointed) to attend upon him or them, and produce his, her, or their accounts, the auditor or auditors shall proceed to take the account *ex parte*, and shall award to the plaintiff or plaintiffs such sum as on his, her, or their showing, shall appear to be justly due; which showing shall be made on the oath of the party, or other evidence, as the nature of the case may require. And upon the parties appearing to render their accounts, the auditor or auditors shall have power to administer an oath to them, according to the form prescribed by law; and the parties being sworn, the auditor or auditors shall have power to inquire by interrogatories, as well of the plaintiff or plaintiffs, as of the defendant or defendants, relative to their respective accounts, and also to cross-examine the parties with respect to each other's accounts, as they shall judge proper; and if either party shall refuse to take such oath, or to answer directly to such interrogatories, such refusal relative to the particular matter to which such oath or answer is required, shall be taken against the party so refusing. And when the auditor or auditors shall have adjusted the account or accounts, and returned the same into

Vermont Stat. vol. 2. p. 348.

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Court, judgment shall thereupon be rendered, if no just cause be shown to the contrary, for such sum as shall be found in arrear from either party, with costs, together with such reasonable costs for the service of the auditor or auditors as the Court shall award; which shall, by the party in whose favour judgment shall be rendered, be paid to the auditor or auditors, and allowed to such party in his, her, or their bill of costs, which said judgment shall be final between the parties."

Section 2. "That actions of account may be sustained on book accounts; and the same proceedings shall be had therein as is in this act before provided in the common action of account."

The statute is express. "When such judgment shall be rendered on confession or *default*, the Court *may*, in legal import *shall*, appoint one or more auditor or auditors in the cause." It appears by the record, judgment was rendered on *default*, and no such auditor or auditors appointed. We conceive, therefore, we have fully maintained the errors assigned, and that the Court will order a judgment of reversal to be entered.

Israel Smith, e contra. We do not contend against the general rule, that a correct judgment cannot be entered up for a greater sum than the plaintiff's demand in his declaration, but the exceptions to the rule are frequent. One exception, which covers our case, is the adding to the sum demanded by the plaintiff the interest which has accrued from the time the debt became payable to the time it is liquidated. Even in an action of debt, where such precision is required, that the plaintiff must have a

verdict for the precise sum demanded, neither more or less, and where the Chancery powers of the Court are called in aid of the defendant to render a final judgment for the sum equitably due, the Court will consider the accruing interest; but this may be said to be aside from the common law. But even in an action of debt on judgment, where no Chancery powers are exercised, and the plaintiff is obliged to declare for his precise debt, and where a cent's variation would defeat the action, the Courts continually add the interest accruing from the first to the second judgment. It is laid down, settled as a general rule in the books, "that where a new action may be brought, and a new satisfaction obtained on that for duties or demands arisen since the commencement of the depending suit, these shall not be included in the judgment on the former action: *but where the interest is an accessary to the principal, and the plaintiff cannot bring a new action for interest grown due between the commencement of the action and the judgment, it shall be included.*" And in *Comyns' Digest* it is expressly declared, under the authority of *Douglas*, p. 676. "*that a Jury may give interest on book debts in the name of damages;*" and the addition of 1 dol. 39 cts. as interest which accrued from the time the book account became payable to the time it was liquidated by the judgment, is all the excess made by the County Court, and in this we conceive they have not erred.

Com. Dig. vol. 3. p. 343. tit. Damages, D.

The arguments advanced in support of the second error assigned, seem to have arisen from not rightly distinguishing between an action of book account, originally commenced before the County Court, and an action of the same nature, originally commenced

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before a Justice of the Peace, and entered by appeal in that Court.

The statute read regulates the proceedings in book accounts only in the former case.

The Legislature, after having given original jurisdiction to Justices of the Peace to hear and determine actions on book account of small comparative magnitude, which was done to save the accumulation of large costs in small suits, with the same economical spirit have saved the expense of auditors in book accounts litigated before a single magistrate, and given full power to the Justice to audit. Section 12. of the act defining the powers of Justices of the Peace within this State, enacts, "That if the plaintiff, in any action pending before a Justice of the Peace, shall be indebted to the defendant by bond, bill, note, *book*, or other contract, the defendant may plead in offset to the plaintiff's demands, any sum within the jurisdiction of a Justice as aforesaid, due to him from the plaintiff, and the plaintiff may likewise plead in offset to the defendant's demand, so pleaded in offset, any other sum within the jurisdiction of a Justice as aforesaid, *and the Justice shall render judgment for such sum as he shall find in arrear from either party.*".

Vermont Stat. vol 1. p. 173. passed *March* 4, 1797.

Ib. 175.

Section 16. "That when any Jury shall be impanelled to try any cause pending before any Justice of the Peace, it shall be lawful for such Jury, and they are hereby empowered to *audit and adjust all accounts* and demands committed to them by such Justice, and draw the just balance between the parties in such cause; and return such balance to the said Justice in their verdict: any former law, usage or custom in this State to the contrary notwithstanding."

Here appears full powers for the Justice's Court to audit book accounts. The only question which can arise is, when the Justice of the Peace has audited the accounts, or rendered judgment for the defendant, and an appeal is entered at the County Court, in what mode shall the appealed cause be conducted? Shall it be put upon the footing of an action of book account, originally commenced before the County Court? or shall the Court proceed to try it under the statute regulations, in the act "defining the powers of Justices of the Peace within this State?" Shall auditors be appointed by the County Court, or shall they proceed to audit the book account?

If the County Court had proceeded to treat the appealed cause as if originally commenced before them, the design of the Legislature in the statute just read would have been defeated. Costs would have accumulated every way disproportioned to the sum in dispute. The County Court have in this case pursued the latter mode, and have considered that it was no great assumption of prerogative in them to audit an account of small amount, and which the Legislature had esteemed commensurate with the knowledge and abilities of a single magistrate. In doing this they have saved costs to the parties, pursued the spirit of the several statutes, and have not erred.

It is said, in case of default it might operate a surprise upon the defendant, to learn that there were no auditors appointed before whom he might contest the plaintiff's claim. As we consider, and as the community consider, the true construction of the statutes, it would operate a greater surprise upon a person who had acknowledged a demand by default, and who had suffered himself to be sued, not because he intended

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to defend, but because he was unable to meet the demand, and who, while he was making every exertion to satisfy the expected writ of execution, had been consoling himself that as little cost as possible had been made, to discover that the plaintiff's claim was referred to auditors before whom he had nothing to contest, and the expense of whose sitting he was obliged eventually to pay.

Langdon, in reply. We shall submit our first exception, with what has already been observed upon it, to the consideration of the Court.

In reply to the observations of the defendant's counsel upon the second error assigned, we would inquire, what benefit was intended to be given by the Legislature by an appeal from a Justice of the Peace to the County Court. Was it merely an appeal from one magistrate to three magistrates; from the Justice to the *bench* of the County Court? or was it to secure to the appellant the privilege of having his cause reconsidered, and tried according to the more liberal practice of a higher Court.

The statute of the 23d of *February*, 1797, prescribing the mode of trial in actions of book account, contemplates two distinct issues, and destines them to distinct tribunals.

The first is, whether the defendant ought to account. If it be found that defendant ought to account, the County Court have no power to audit, but must appoint an auditor or auditors. The other issue, whose object is to discover the quantum due, can alone be decided by the auditors. The plaintiff in error, when in the County Court, had a right to the trial of these two issues, and before the several

tribunals. He abandoned his right to the first by his default; but he considered, and had sufficient reason to consider, that he was entitled to the second. There is no express law, depriving him of this privilege. It is expressly given to him by the statute. The words are, "That when any defendant or defendants, in any action of account, *pending* in any Court in this State, shall plead, &c. the Court shall render judgment to account, and when such judgment shall be rendered on confession or *default*, the Court may appoint an auditor or auditors," &c. The only question is, was this an action of account pending in the County Court? not, How did it come there? Was it originally commenced, or was it entered by appeal from a Justice of the Peace. This is a distinction created by my brother *Smith's* ingenuity, but not expressly found in the statutes, and not to be deduced from any fair construction of them.

A party may have a reasonable predilection for the mode of investigation by auditors. The crowd and bustle of a Court seem ill adapted to the necessary and minute investigation of the various items of a long book account, and auditors, like a struck Jury, are often better judges of the subject matter of an account than the most learned Judges, or a Jury fortuitously elected, can be presumed to be. With the single cause before them they have more leisure to attend to it; while, by frequent adjournments, accommodated to the necessities of the case, or the parties, they are enabled to investigate critically. They are in fact judges elected immediately by the parties; for although the Court appoint, yet when the parties agree upon the men, the Court never fail to confirm their nomination. The appeal may be

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therefore taken, and the default suffered, with the very design of carrying the account in dispute before auditors. It was probably done in this case, but has been defeated by the erroneous judgment of the County Court.

The reason why the Legislature empowered the Justice's Court to audit book accounts in the statute cited by Mr. *Smith*, is because they considered that accounts simple in their nature, and not involving any abstruse points of law in the litigation, would ordinarily come before them; but they gave a right of appeal, that in cases more intricate, the accounts might be examined by auditors of superior acquirements in scientific or mercantile concerns.

We therefore contend, that the County Court erred in rendering judgment on the record in question, without referring the book account of the plaintiff to an auditor or auditors.

Opinion of the Court.

Chief Judge. The two errors assigned in the record *inter alia* not inserted upon are,

First. That the County Court, in their judgment for the plaintiff, exceeded his demand.

Upon this point the Court are clearly of opinion, that the County Court were correct in adding to the sum demanded by the plaintiff in his declaration the sum of one dollar and thirty-nine cents, which appears by computation to have been merely the interest which accrued from the date of the last charge in the account to the time of rendering the judgment.

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The second error assigned is, that the County Court, upon the default's being taken, omitted to appoint an auditor or auditors to examine and adjust the book accounts between the parties.

The statute of the 23d of *February*, 1797, entitled, an act relating to actions of account, can only control actions of book account originally commenced before the County Court.

The Court are decidedly of opinion, that the statute of the 23d of *February*, 1797, entitled, an act relating to actions of account, can only control actions of book account, originally commenced before the County Courts; that when an action of book account is commenced before a Justice of the Peace, the Justice, or the Jury if a Jury should be impanelled, must audit the accounts under the provisions of the 12th and 16th sections of the act defining the powers of Justices of the Peace within this State; and upon appeal to the County Court, entry and default, it is the duty of the County Court to audit the book account, which they may at their discretion do by themselves or by another or others, not being restricted by the statute of the 23d of *February*, 1797, which does not extend to actions on book account, within the jurisdiction, and appealed from a Justice's Court, but according to the provision of the 54th section of the judiciary bill, which provides, "that when judgment shall be rendered by default or on demurrer, in any Court in this State, the Judges of such Court shall have full power, by themselves, by the Jury in Court, the report of the clerk, or the report on oath of one or more judicious person or persons, to be appointed as an inquest by the Court to ascertain the sum due, and award execution thereon accordingly."

Vermont Stat. vol. 1. p. 73.

Let judgment therefore be entered, that the Court having inspected the record, find that there is no

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The defendant in error pleaded the statute of limitation in bar in abatement to the action, section 11th, " That no judgment or proceedings in course of justice in any real or personal action, shall, from and after the passing of this act be reversed or avoided for any error or defect therein, unless the writ of error, or suit for reversing such judgment or proceedings in course of justice be commenced and duly served on the defendant or defendants in error, according to law, *within one year next after the rendition of such judgment*, or within one year next after such error or defect shall have intervened;" and then alleged, that the judgment was rendered at the *January* term of the Supreme Court, 1800, and the writ of error served the 11th of *March*, 1801, more than one year next after the rendition of such judgment.

Vermont Stat. vol 2 p. 409. passed *November* 6, 1797.

Ib. p. 410.

The plaintiffs replied over the saving clause of the same section, saving always unto infants, *feme coverts*, persons *non compos mentis*, persons in prison, beyond seas, or without the *United States*, the right of bringing any writ of error or suit for reversing any judgment or proceedings in the course of justice at any time within one year next after such impediment shall be removed, and not after; and alleged, that *Erastus Goodrich*, one of the plaintiffs in error, at the time of rendering said judgment was a minor under the age of twenty-one years, to wit, of the age of twenty years and three months, and no more, on the 20th of *January*, 1800, being the time of rendering said judgment, and that one full year did not elapse after the said *Erastus Goodrich* became of age, before the said plaintiffs brought their said writ of error, and served the same on the defendant, as by

said writ of error, and service thereon made, would more fully appear; *et hoc parati sunt verificare.*

To this replication defendant demurred.

The question now is, whether, when an infant is coupled in a judgment as defendant with others of full age, and error is brought by *all* after the expiration of a year from the judgment rendered, but within a year from the time the impediment of infancy is removed, the writ of error is barred by the statute, or within the purview of the saving clause.

By the Court. Must not all parties against whom judgment is rendered, join in a writ of error?

Defendant's counsel. We consider that *some* may bring error *sub modo.*

Court. It is laid down in *Rolle's Abridgment*, as cited by Chief Baron *Comyns*, "that though some get nothing by the reversal, they must join for conformity;" and if judgment against two, writ of error *ad grave damnum* of one will not lie. Though some who are not attached to the record, yet privy to the judgment, may join in the writ, yet certainly all those who are subjected to the judgment must join, if living, and if not the decease must be suggested in the writ. The law upon this point is expressly laid down in the case of *Walter* v. *Stokoe*, 1 Lord *Raym. Rep.* "Judgment in trespass was given against five; four bring error, and adjudged that the writ was not good. For all persons against whom a joint judgment is given ought to join in a writ of error; but it appears here upon the face of the writ, that there was another person against whom the judg-

Roll. 1. p. 747. l. 35. *Com. Dig.* vol. 5. p. 701. tit. *Pleader.* 3 B. 9.

P. 71.

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ment was given, who has not joined in the writ of error, and it is not alleged that he is dead, and therefore the writ is bad." In the case in question, could the original *adult defendants* have sustained error without joining *Erastus Goodrich?* Could they have joined him *dum infra ætatem?* How then could they have brought their writ within the year from the judgment?

Defendant's counsel. We consider that his name might have been joined under the sanction of an official or natural guardian, or *prochein ami.*

Court. Could the adult original defendants have compelled him or them to join in the suit?

Defendant's counsel. We see no greater difficulty in compelling the guardian to join, than in enforcing any partner, in a judgment where there are several defendants, to join for the benefit of the others in a writ of error; and we find in a note under the case of *Walter* v. *Stokoe*, in Lord *Raymond's Reports*, cited by the Court, under the authority of *Carthew* and *Yelverton*, "that if any of them refuse, he or they should be summoned and served."

Carth. 8. *Yelv.* 4.

There is no process in this State to compel the privies in a judgment to join in a writ of error.

Court. We have no such process in this State; but if there were, could it apply in cases where no official or natural guardian exists? An infant must prosecute by his guardian or next friend, and he must defend by them when sued; but the plaintiff who sues an infant cannot elect a guardian, or force a *prochein ami* upon him by his writ; he must in such case, if no one appears to defend for the infant, move the

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Court, who will appoint a *prochein ami*. Neither can he, if he is coupled in judgment with an infant, appoint a guardian to him, or force a *prochein ami* upon him by inserting his or their names in his writ of error. If he inserts the infant's name alone in the writ, the Court cannot aid him by appointing a guardian to prosecute. The only power the Court have to appoint a guardian to an infant party, is where he is made defendant, and this from the urgency or necessity of the case. An infant may be sued for a trespass. If he has an official or natural guardian, he may appear in his defence on the record. If he has none, the Court will appoint some one to plead for him. But this urgency or necessity does not reach the case where the infant is plaintiff. There the Judge of probate may appoint, or preparatory arrangements be made with the natural guardian or next friend, to lend his name in aid of the prosecution. The Court, therefore, never appoint a guardian to *prosecute*, but only to defend an infant party.

The Court never appoint a guardian to *prosecute* for, but only to *defend* an infant party. Vide R. 2 *Cro.* 641. in support of this practice.

The Court are therefore clearly of opinion, that the writ of error would have abated if brought by the original adult defendants during the minority of *Erastus Goodrich;* and the writ appearing to have been served within a year after the impediment of nonage was removed, the action is not barred by the statute of limitations, and the plaintiff's replication is sufficient, and that the plaintiff's writ do not abate.

Respondeas ouster.

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Argument upon the errors assigned.

If an infant is coupled in a judgment on trespass with others of full age, and error is brought by all, and the error assigned be, that it does not appear on the record that the infant defended the suit by guardian, and the defendant in error alleges in his plea, that the natural guardian *actually appeared and employed counsel to defend the suit for the infant*, on demurrer such appearance will be held sufficient, and the original judgment will not for that cause be reversed.

The error assigned is, that at the time of rendering the judgment aforesaid, the said *Erastus Goodrich* was a minor under the age of twenty-one years, to wit, of the age of twenty years and three months, and no more, and legally and totally incapable of appearing and answering or defending in said suit, in any way other than by a guardian, and that the plaintiff did not cite any person to appear as guardian to said minor, nor was any person appointed by the Court; that the Court did proceed to render one entire judgment against the said *Merrit Priest*, *Davis Olney*, *Erastus Goodrich*, and *Joseph Davidson*, whereas the said *Erastus Goodrich* never had any day in Court, or any opportunity to put in a plea, or to be heard in said matters, and no damages ought to have been given or assessed against the said *Erastus Goodrich*, or either of them; and then a general assignment of errors.

And now the defendant in error comes, &c. by his attorneys, &c. and pleads and says, that although true it is, that the said *Erastus Goodrich* was a minor under the age of twenty-one years, at the time of rendering said judgment, as the plaintiffs in their declaration have alleged, yet he saith, that *Asa Goodrich*, the father and natural guardian of the said *Erastus*, and *Jonathan Orms*, to whom the said *Erastus* was, at the time of the trial and judgment aforesaid, an indented apprentice, as guardian and master to the said *Erastus*, were duly notified of the action aforesaid, on which the judgment aforesaid was rendered as aforesaid, and that as guardian and master

as aforesaid, the said *Asa Goodrich* and *Jonathan Orms* jointly and severally engaged, retained, and employed *Israel Smith*, *Samuel Walker*, and *John Cook*, Esquires, attorneys of this Court, to defend the said *Erastus Goodrich* in the action aforesaid, and that the said *Israel Smith*, *Samuel Walker*, and *John Cook*, attorneys as aforesaid, did defend the said *Erastus* in said action to the final judgment aforesaid, *absque hoc*, and therefore, &c.

To this plea the plaintiffs in error demurred.

Counsel for the demurrants. The plea confesses, that *Erastus Goodrich* was, at the time of rendering the judgment, a minor, but avoids, or attempts to avoid, the error assigned, to wit, that the now plaintiffs in the original suit did not cite any person to appear as guardian to the minor, nor was any person appointed by the Court, by alleging that *Asa Goodrich*, the parent and natural guardian of *Erastus Goodrich*, and also *Jonathan Orms*, to whom the minor was an indented apprentice at the time of the trial, and rendering judgment, were notified, and appeared and employed certain attorneys of the Court to defend the action on part of the minor.

We consider this plea to be bad, in this, that it does not set forth that *Asa Goodrich*, the parent and natural guardian of *Erastus*, obtained leave of the Court to defend as guardian to the minor, or appears to have defended him on the record. We do not notice *Jonathan Orms*, as he could not be considered as guardian to the minor by virtue of the indentures of apprenticeship.

When an infant is made defendant, he cannot defend himself. "He must appear only by guardian,

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for he has not knowledge of his own affairs, or to choose a man who can plead well for him." *Com. Dig.* vol. 5. p. 572. tit. *Pleader*, 2 *C.* 2.

So, p. 573. "If several defendants appear by attorney, *and one is an infant, it is error*, and the judgment shall be reversed against all."

The practice is well settled in the case of *Shipman* v. *Stevens*, *C. B.* 2 *Wils. Rep.* p. 50. "Where the defendant is an infant, the plaintiff ought to apply to him to name his guardian, and in default thereof the plaintiff must apply to the Court to oblige him so to do."

If the infant party has a natural guardian, he cannot appear and defend for him without leave of Court, and this leave of Court should appear on the record. It is not an evanescent thing, like the interlocutory opinions of the Court, which decide the admissibility of witnesses, or the priority of speaking: but it is an important part of the process, without which the judgment will be erroneous; therefore it is not sufficient to say, as in the plea, that the thing happened; but, was it done by leave of Court, and is it recorded. If it had happened, and the clerk had by mistake omitted to notice it in making up the record, it is a fact of such a nature as would have obtruded itself prominently on the record. In pleading the general issue, which was pleaded *severally*, *Erastus*, the minor, would appear to have pleaded by *Asa Goodrich*, his parent and natural guardian *per Curiam specialiter admiss.*

In the case of *Peachy* v. *Harrison*, 1 Lord *Raym.* p. 252. it is laid down, that the admittance of a guardian for an infant plaintiff must be entered on the record, and the same applies to the admittance of a

guardian to an infant defendant; and so we consider has been the uniform practice of this Court.

Counsel for defendant in error. It stands confessed by the demurrer, that *Erastus Goodrich*, the minor, appeared and defended the suit by counsel employed by his guardians; but it is contended this should have been by special leave of the Court, and been made part of the record. Perhaps the practice has been too lax; but we consider, that by our practice, where an infant defendant has appeared by his official or natural guardian, the guardian has always been permitted to defend without special leave of the Court; but where no official or natural guardian appeared, and the Court has appointed one *ex mere motu*, or upon application of the opposite party, then and then only has the record of the appointment, and license to defend, been made. If there be any force in the observation, that if the fact of defence by guardian had existed, it would have obtruded itself on the record, we reply, that the guardian by indenture of apprenticeship, *Jonathan Orms*, and the parent and natural guardian of the minor, *Asa Goodrich*, do appear to have defended him on the record; the first having entered bail for the minor's appearance at Court on the mesne process, the second having entered a recognisance for the minor's appeal to this Court.

But to consider the subject more particularly: We contend, that when an infant is connected with other defendants of full age, he may appear and defend with the others, under the power of attorney made by them, although the infant cannot thus appear and defend when sole defendant, for this obvious reason,

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that he cannot execute a power of attorney. It is laid down in the books, " If several sue jointly, and some are within age and some of full age, and all appear by attorney, it is no error; for those of full age may make an attorney for all;" and by parity of reason, if several *are sued*, some within age and some of full age, and all appear by attorney, it is no error.

Com. Dig. vol. 5. p. 572.

The cases cited from *Comyns' Digest*, Lord *Raymond's* and *Wilson's Reports*, are therefore not in point, for they contemplate suits where the infant is *sole defendant*, and cannot take the benefit of the letter of attorney executed by his co-defendants who are adult.

We contend further, that if an infant, when joined with other defendants of full age, cannot defend by attorney, yet if he have a parent or natural guardian, who appears and defends for him, such defence may be made without special leave of the Court, or such leave, if necessary, will be presumed, if a natural guardian exists and has had notice, which is in the present case, and need not be made matter of record. The admission by the Court of a guardian to defend an infant, appears not to have been considered in the *English* Courts as a matter of so high import as is contended for by our opponents; for we read, " If an infant defendant appears and pleads by guardian *regularly*, he ought to be admitted before he appears or pleads; but if *he is not admitted, it is not error*, but only a misdemeanor in the attorney;" and this comports with our practice, as already suggested.

Ib. p. 573. tit. *Pleader*, 2 C. 2.

As this is an error in fact, why did not the plaintiff meet us fairly upon the issue, whether *Erastus* the minor did or did not appear and defend the original

suit by his guardians? It seems they dreaded this investigation, and have rested their cause upon a mere technical omission in the record, which the Court, we trust, will not favour.

Counsel for the demurrants. We do not consider this a mere technical omission in the record. The authorities cited show such omission has been considered as substantial error.

It is objected, that the cases cited are not in point, as they recite cases wherein the infant is sole defendant; yet the position laid down by Chief Baron *Comyns*, which is supported by numerous respectable authorities, says, "that if several defendants appear by attorney, and one is an infant, it is error, and judgment shall be reversed against all."

R. 2 *Cro.* 289. 1 *Roll.* 776. l. 25. R. 2 *Cro.* 303. R *Al.* 74. R. 1 *Lev.* 294. R. *Fig.* 1.

The position read from the same author by our opponents, "that if several *sue jointly*, and some are within age and some are of full age, and all appear by attorney, it is no error, for those of full age may make an attorney for all," certainly cannot apply.

First. It is applicable only where infants are joined with adults *as plaintiffs*, and *not as defendants*.

Secondly. It respects joint actions; "*if several sue jointly*." There may result a necessity for the immediate prosecution of actions upon joint contracts, and those of full age cannot injure those under age by commencing and prosecuting suits for the recovery of *their* interest, as conjointly connected with their own; but in joint and several contracts, the reason would not apply.

Neither would the reason of this position apply to infants joined with adults as defendants, at least where

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the action was not joint, and several defences might be made.

It will be recollected, that, in the present case, *Erastus* the minor pleaded *severally*. If, therefore, he might have been covered by the power of attorney of the other defendants, he certainly was not, having made a separate defence.

It is said, if an infant defendant have a natural guardian, the guardian may by our practice appear and defend without leave of Court, especially obtained. Be it so. But this is aside of the question mooted; which is, whether the guardian did in this case appear and defend by leave of Court, and whether, if the fact existed, the Court, sitting as a Supreme Court of Errors, can know it, but by the record. It certainly is not expressly set forth in the record. If it were, we should naturally expect to find it in the first plea of *Erastus* the minor. Here is the proper place for the guardian to appear in defence of his ward. Here it is not. But it is said, that *Asa Goodrich*, the parent and natural guardian, and *Jonathan Orms*, the minor's master by indenture of apprenticeship, appeared and defended the action for him. How? One by entering bail for him on the mesne process, the other for the appeal? Is this defending the suit?

It is said, the admission of a guardian to defend an infant party is lightly esteemed in the *English* Courts. But in the case of *Peachy* v. *Harrison*, the plaintiff, being an infant, brought an action by guardian, and after verdict for him it was moved in arrest of judgment, that there was no warrant for him to appear by guardian entered upon record; and it was resolved by the whole Court, that *the admittance of a*

guardian ought to be upon record, because it is the act of the Court; for the Court takes care of infants, that none shall sue for them but those that are responsible; for if the infant be prejudiced, he may have his action against him. But judgment cannot be arrested for this cause, any more than if no warrant of attorney be filed. But upon error brought, and diminution alleged and certified in *B. R. it will be ill, for which the judgment may be reversed.*

The position read by our opponents from *Comyns' Digest*, "that if an infant defendant *appears and pleads* by guardian regularly, he ought to be admitted as such before he appears or pleads; but if he is not admitted, it is not error, being only a misdemeanor in the attorney," goes only to *the mere act of admission by the Court.* But if the case had been, that the record did not show that the guardian *appeared and pleaded*, it would undoubtedly have been error.

It is said the practice of this Court has been lax in such cases. It is then surely time to give it tone. Actions of trespass may, it is true, be maintained against infants. It is right it should be so. The peace of society requires it. But when sued, the law will still consider them as infants. They may suffer, but they cannot act; and if they have attempted to act in their nonage, as by defending a suit *personally*, the law will enable them, when arrived at legal maturity, to review what they may have suffered during the imbecility of infancy, and will not permit any one to keep an advantage gained over them during that imbecile æra. If the infant has had damages awarded against him by judgment of Court, upon his coming of age he will repair to the record. If he therein discovers, that his guardian appeared and de-

Priest and others v. Hamilton.

fended his cause for him, he must rest satisfied. But if he finds, as in the present case, that a judgment has been rendered against him at a time when, in the words of an author cited, "he had not knowledge of his own affairs," and that without a guardian to defend him, he will render the saving clause of the statute of limitation, error such judgment, and seek by due course of law to obtain that justice as a man which was not rendered him when an infant. For these reasons, if the record has not hitherto, it ought surely henceforth, to notice the important and substantial fact in the process, that the guardian of a minor appeared, pleaded, and defended him in a suit brought against him by especial appointment, or leave of the Court.

Judgment affirmed.

Lott Hall and *Samuel Prentice*, for the plaintiff in error.

Daniel Chipman, *Cephas Smith*, Junior, *Chauncey Langdon*, and *John Cook*, for defendant.

Hazen et Ux. v. Smith and Caswell

NEHEMIAH HAZEN et UXOR, Reviewers,
against
PETER SMITH and JOSIAH CASWELL, Reviewees.

Vide *ante*, vol. 1. p. 105.

DEBT on recognisance entered by a private informer, in pursuance of an order of a Justice of the Peace holding a Court of Inquiry.

Demurrer to the declaration.

This cause was argued and determined upon the same pleadings in favour of the reviewees, in this County, *January* term, 1801. And now,

Upon the review of a cause decided upon demurrer, and resting on the same pleadings, the Court will not prohibit the counsel from arguing it again.

Cook, for the reviewees, insisted, that as the issue embraced points in law only, which had been solemnly argued and decided by the Court, the Court would not now proceed to hear the same points argued; for this would be tantamount to the sustaining a writ of error to reverse the judgment of this Court in matters of law; but that the Court would consider the review as entered merely for the purposes of delay, and would without further hearing affirm the judgment of the Court already delivered.

Vermont Stat. vol. 1. p. 53, chap. vi.

Sed per Curiam. The third section of the judiciary act secures the right of review in all civil causes originally commenced before the County Court, and brought by appeal to this Court, with certain exceptions, which do not embrace this case, and the Court cannot deprive a party of this right, with the privileges incident to it.

In our judicial system, several trials are allowed, in order to afford the parties time to cast all the light

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upon the subject litigated, of which it may be capable by the adduction of evidence, or the application of arguments or authorities, and also that the Judges may have such view of the subject, as that they may be enabled to administer the law correctly.

The case of a review of a judgment rendered on an issue at law, cannot compare with a writ of error brought to reconsider a bench decision, as a review supposes the cause not to have been sufficiently investigated. But before a writ of error can be brought, the parties have had the opportunities of several trials, and the law will presume that the legal points in the cause have been sufficiently considered and solemnly decided.

The exceptions in demurrer were argued, and the Court decided the declaration sufficient. At *February* term, 1803, the bond was chancered to 100 dols. 92 cts.

Judgment for the plaintiff.

Daniel Chipman and *Chauncey Langdon*, for plaintiffs.

—— —— and *John Cook*, for defendants.

DARIUS CHIPMAN, Reviewer,
against
JAMES SAWYER, Sheriff of Chittenden County, Reviewee.

Vide *ante*, vol. 1. p. 83.

DEBT on escape. Special demurrer to the declaration.

The demurrer was again argued at this term, and the Court confirmed the opinion of the late Judges by decisions, that nominal plaintiff in ejectment cannot maintain an action against a sheriff for an escape of a defendant committed *in his* name for the damages and costs recovered in the action of ejectment; and that a sheriff, as keeper of the prison to which is committed a debtor from another County, is not liable for the *negligent* escape of such debtor.

The nominal plaintiff in ejectment cannot maintain an action against a sheriff for an escape of a defendant committed in his name for the damages and costs recovered in the action of ejectment.

A sheriff, as keeper of the prison to which is committed a debtor from another County, is not liable for the *negligent* escape of such debtor.

Judgment for defendant.

Israel Smith and *Daniel Chipman*, for plaintiff.
Chauncey Langdon and *John Cook*, for defendant.

CHALKLEY JAMES, Appellee,
against
SIMEON SMITH, Appellant.

Correction of an inaccuracy in the report of the cause of *Chalkley James* v. *Simeon Smith*, suffered in the first volume, p. 136.

DEBT on recognisance; default, and motion to chancer.

This cause was heard on the motion to chancer, *January* term, 1801, and continued for the Court to advise.

In the report of this cause in the first volume, p. 128. 136. there is an inaccuracy in the minute, which states, that "at the ensuing term the Court chancered the bond of recognisance to a sum merely nominal." At this term, after argument upon the motion to chancer, *the Court intimated their intent* to chancer the bond to a sum merely nominal, and the plaintiff then moved to enter a nonsuit, which was granted upon the payment of full costs.

Cephas Smith, for plaintiff.
Chauncey Langdon, for defendant.

NOTE.

Note on the case of *Jasper L. Drake* v. *Nathaniel Collins*, reported vol. 1. p. 79.

THE opinion of the Court, that a promissory note deposited with arbitrators, subject to their endorsement to the amount of their award, is void, delivered in this County in the case of *Jasper L. Drake* against *Nathaniel Collins*, *January* term, 1801, reported volume 1. p. 79. was much doubted at the time, and has since been followed by no similar decisions. It will be observed, by recurrence to that report, that the decision was not supported by the unanimous opinion of the bench. The Chief Judge and *Hall*, Assistant Judge, divided, whilst *Smith*, Assistant Judge, inclined to be in opinion with Judge *Hall*, that such notes are not in themselves void, but merely voidable; but eventually he esteemed it to be his duty to concur in opinion with the Chief Judge.

When we consider the nature of our trials by Jury, we shall not be surprised, that, as in case of trial at *Nisi Prius* in elder governments, judicial opinions should sometimes be hastily and *perhaps* incorrectly given.

At the request of several respectable members of the bar, who considered some intimation to this effect might be proper to guard junior practitioners from relying upon this questionable decision too strongly, this note is inserted by

THE REPORTER.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

BENNINGTON COUNTY, FEBRUARY TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

WILLIAM HALL, Appellee,
against
RICHARD BROWN, Appellant.

Upon a complaint brought upon the *second* section of the act to prevent forcible entry and detainer, *it is necessary* that the magistrate issuing the process should enter on the complaint a minute of the time of its exhibition.

APPEAL from a Freehold Court.

The complaint was made to *Samuel Safford*, Judge of the County Court, and *Josiah Wright*, Justice of the Peace, and charged *Brown*, that on the 10th day of *April*, 1801, *vi et armis* and with strong hand, he entered into possession of the complainant's land in *Pownal*, (butted and bounded,) which land the complainant averred he had lawfully and peaceably possessed for more than three years before the

forcible entry of the defendant, who with like force and strong hand continued to hold said land, and to keep out the complainant, by reason of which unlawful and forcible entry and detainer, the complainant was damaged 1,000 dollars, and to recover possession of the land, with costs, he brought suit. *The process was by summons*, and the defendant was found guilty by the inquest, and appealed to this Court.

And now at this term, the defendant filed the following motion:

William Hall, Appellee,
v.
Richard Brown, Appellant. } Supreme Court, &c.

The defendant here moves the Honourable Court, that said cause be no longer prosecuted against him, because he says, that the magistrate or magistrates, signing the original writ in said action, did not, at the time of the exhibition of said complaint, make a minute in writing, under their official signature, on the complaint of the plaintiff, of the true day, month and year when the same was exhibited to or signed by said magistrate or magistrates, agreeably to the statute in such case made and provided: wherefore the defendant prays here to be dismissed, with his costs. By

D. Fay.

Fay, in support of the motion, read the 5th section of the act for the limitation of suits on penal statutes, criminal prosecutions, and actions at law. That when any bill, *complaint*, information, or indictment, shall

Vermont Stat. vol. 2. p. 407. passed *November* 6, 1797.

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be exhibited, or any action or suit brought or commenced in any of the cases mentioned in the preceding sections of this act; the clerk of the Court, or magistrate to whom such bill, complaint, information or indictment, shall be exhibited, or who shall sign the original writ in such action or suit brought or commenced as aforesaid, shall, at the time of exhibiting or signing as aforesaid, make a minute in writing under his official signature, on such bill, complaint, information, indictment, or original writ, of the true day, month, and year, when the same was so exhibited or signed; and every bill, complaint, information, indictment, or original writ, on which a minute of the day, month, and year shall not be made as aforesaid, shall be *void*.

He then insisted, that there appearing to be no such minute made by the magistrate in writing, under his official signature, upon this complaint, the whole must be dismissed as a *void* process.

Langdon, e contra. We contend, that this is not one of those complaints upon which such minute is required to be made.

The 5th section of the statute of limitations directs, that such minute shall be made, not in all cases indiscriminately, but "in any of the cases mentioned in the *preceding sections* of this act." This leads to an examination of the preceding sections. If the present complaint is within the purview of the 5th section, it must be mentioned in those preceding.

The *first section* relates merely to actions *qui tam*.

The second is merely a proviso to the first, and takes out of it such special limitations of *qui tam* actions as may have been made by particular statutes.

The third section enacts, that all actions, suits, bills, complaints, informations or indictments, which at any time hereafter shall be brought, had, commenced, or prosecuted *for any crime or misdemeanor*, (theft, robbery, burglary, forgery, arson, and murder, excepted,) shall be brought, had, commenced, or prosecuted within three years next after the offence was committed, or shall be committed, and not after the expiration of the said three years; and all actions, suits, bills, complaints, informations, and indictments, which shall be brought, had, commenced, and prosecuted, for theft, robbery, burglary, and forgery, shall be brought, had, commenced, and prosecuted within six years next after the commission of the offence, and not afterwards; and if any action, suit, bill, complaint, information, or indictment, for any crime or misdemeanor, (except arson and murder,) shall be brought, had, commenced, or prosecuted, after the time hereby limited, that then the same shall be void and of no effect; any law, usage, or custom to the contrary notwithstanding.

To be included in any possible way within these preceding sections, this complaint must be within the 3d section, for *a crime or misdemeanor*. It appears, by inspection, to have been for neither. It is a mere civil process; a summary action of ejectment, to regain possession of land from which the plaintiff has been ousted. The prayer and the object of the complaint is, not to punish the defendant, but merely to recover actual possession of the land, "and to recover possession of the land with costs, the plaintiff or complainant says he brings suit." The magistrates so considered it. The *process is by* SUMMONS, which

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implies a *civil* process. Judge *Blackstone* defines a summons as a notice given upon all real *præcipes*, and also upon all personal writs for injuries *not against the peace*. The proper process for a crime or misdemeanor is a warrant, which is thus defined by the same accurate and luminous author: "An arrest by warrant is the apprehending or restraining one's person, in order to be forthcoming to answer an alleged or suspected crime." In our practice, to speak of a summons to answer for a crime, would be a professional solecism. We therefore conceive, that the statute does not require that a minute of the time of exhibition of a complaint, like the one now in question, should be made upon it, and therefore trust that the Court will dismiss the motion.

Bl. Com vol. 3. p. 279 *English* and *Tucker's* editions.

Bl. Com. vol. 4. p. 289. *Eng.* and *Tuck.* edit.

Fay. It is objected to our motion, that the complaint in question is not within the purview of the 5th section of the statute of limitations. This section refers to preceding sections, and it is conceded, that t is included in the *third*, if the complaint charges the defendant with *a crime*. Has he not so charged the defendant? Shall the privately taking a few cents from me be considered as a crime, and shall it not be held criminal with force and strong hand to oust me of my domicile, and, what may be far more injurious in this land of farmers, to violently thrust me out of possession of my land, of my farm upon which I depend for bread, fuel, and clothing for my family? Surely he who takes my purse, in comparison with this injury "steals trash."

Our *English* ancestors considered forcible entry and detainer as a crime. It was always so considered by the common law. By the statute of the 5th

Stat. 1. c. 8.

of *Richard* II. passed so early as the year 1382, "forcible entries are punished with imprisonment and ransom at the King's will;" and by the several statutes of 15 *Rich.* II. c. 2. 8 *Hen.* VI. c. 9. 31 *Eliz.* c. 11. and 21 *James* I. c. 15. "upon any forcible entry or forcible detainer, after peaceable entry upon any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riot, and upon such conviction may commit the offender to gaol till he makes *fine* and ransom to the King; and moreover the Justice or Justices have power to summon a Jury to try the forcible entry or detainer complained of; and if the same be found by that Jury, then, besides the *fine* on the offender, the Justices shall make restitution by the sheriff, of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, *punished*, and remedied by them."

Bl. Com. vol. 4. 147. *Eng.* and *Tuck.* edit.

The several provisions of these statutes, so far as applicable to our state of society, are embodied into our statute against forcible entry and detainer, passed 27th *February*, 1797.

Vermont Stat. vol. 1. p. 216.

Our statute distinguishes between forcible entry and detainer, and detainer without force; between that which shall be esteemed criminal, and that which shall be considered a mere civil injury. It gives the remedy of restitution in both cases, but annexes a fine and imprisonment to enforce the payment of it only to the former.

The second section gives power to two Justices of the Peace, one of whom shall be a Judge of the County Court, to inquire by a Jury, as is therein

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after directed, referring to section 3. as well against those who make unlawful and forcible entry into lands, tenements, or other possessions, and with a strong hand detain the same as against those who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same, and to cause restitution to be made.

Vermont Stat. vol. 1. p. 216.

The third section details the process, and provides, that " if the Jury, after a full hearing, find the person against whom the complaint is made, guilty of the forcible entry and detainer complained of, they shall all sign their verdict; and the said Justices shall enter up judgment for the complainant to have restitution of the premises, and shall impose such fine, not exceeding ten dollars, as they, considering all the circumstances, may think just, and shall tax costs for the complainant, and may commit the person against whom judgment is so made, until the fine be paid.

Ib. 217, 218.

The sixth section enacts, " That when any person shall wilfully and without force hold over any lands, tenements, or other possessions, after the determination of the time for which they are demised or let to him, or to the person under whom he claims, or when any person wrongfully and without force by disseisin shall obtain and continue in possession of any lands, tenements, or other possessions, and after demand made in writing for the delivery of the possession thereof by the person having the legal right of such possession, his agent or attorney, shall refuse or neglect to quit such possession, upon complaint thereof in writing to two Justices of the Peace, one of which shall be a Judge of the County Court, the said Justices shall proceed to hear, try, and determine the

same in like manner as in cases of forcible entry and detainer, and issue a writ of restitution accordingly.

"Provided always, that in such case the original process shall be a summons, and the Justices shall have no power to assess a fine on the person complained of."

The complaint in question is brought upon the second section, and by the third section the Freehold Court may impose a fine, and may commit the person amerced until the fine is paid. Here is a *crime* contemplated by the statute, and a *fine* annexed.

But it is objected, that this complaint is not for a *crime*, because the process was by *summons*. We conceive this to have been a mere mistake in the magistrates issuing the process, and that it cannot effect the essential qualities of the complaint. If complaint is preferred for a murder or other felony to a Justice of the Peace, would it become a complaint for a mere civil injury, because the magistrate had issued a summons for the appearance of the person charged.

It is further objected, that the complainant has not prayed for the punishment of the defendant. The complainant knew this would be the consequence of final conviction, but he was not obliged to pray for it. All he was to seek was restitution of his land; and the Justices, upon conviction, were *ex officiis* to impose a fine.

When we consider the intent of the act, which renders a minute necessary to be made upon the exhibition of a complaint, shall we not find it equally applicable to the complaint in question? The first proviso in the act against forcible entry and detainer contains a limitation. Provided always, that nothing

Vermont Stat. vol. 1. p. 217.

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in the foregoing part of this act shall be construed to extend to any person or persons who have had the quiet, peaceable, and uninterrupted occupation of any lands, tenements, or other possessions, for the space of three whole years next before the entering such complaint. Here it appears necessary that the time of the exhibition of the complaint should be precisely ascertained. Is it not therefore as necessary, that the time of preferring the complaint should be ascertained and placed beyond controversy by the minute of the magistrate, in order to compute correctly the three whole years next before the entering such complaint, as it is to ascertain by such minute the precise time of presenting an indictment to this Court for theft, robbery, burglary, or forgery, which are confessedly and expressly within the purview of the fifth section of the statute of limitations.

We therefore consider, that this complaint having no such minute entered upon it is *void*, as declared by the statute, and therefore the whole process is void, and must be dismissed; for *debile fundamentum, fallit opus.*

Opinion of the Court.

Vide *ante*, vol. 1. p. 345.

The subject having been before the Court at the late term in *Chittenden* County, in the case of *Ira Allen, administrator of Ethan Allen*, v. *Gideon and Jonathan Ormsby*, it was at first concluded by the Court, and suggested to the parties, that the decision in that cause had settled the construction of the fifth section of the statute of limitations, as applicable to the act to prevent forcible entry and detainer; but as that decision, by recurrence to our minutes, is found

to apply particularly to complaints brought upon the sixth section of this act, the Court were inclined to a further discussion.

In the present case, the Court consider the fifth section of the statute of limitations, which renders a minute by the magistrate necessary on the exhibition of a complaint in certain cases, to apply to complaints exhibited to the Justices of a Freehold Court against those "who make unlawful and forcible entry into lands, tenements, and other possessions, and with a strong hand detain the same," and "against those who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same."

That the magistrate's power to impose a fine upon conviction, stamps the acts of forcible entry or forcible detainer as criminal; and therefore they are included in the purview of the *preceding* third section of this statute.

And the only question in this case is, was the present complaint brought upon the *second* or the *sixth* section of the act to prevent forcible entry and detainer.

The Court consider the complaint to have been brought upon the second section, and that the magistrate's issuing process by summons cannot alter its inherent and essential qualities.

Let judgment be therefore entered, that the complaint be quashed.

Complaint quashed.

Chauncey Langdon, for complainant.
David Fay, for defendant.

Smith v. Shumway.

ISAAC S. SMITH, Appellant,
against
JOHN SHUMWAY, Appellee.

Vermont Stat. vol. 1. p. 56. c. vi. s. 7.

IN this trial, *Robinson* and *Tyler*, Judges, having been of counsel, *Jacob*, Assistant Judge, sat alone.

Defamation. General issue pleaded, with notice, and cause to the Jury.

The facts stated in a notice under the general issue cannot be taken as evidence against the defendant.

In the course of the trial, plaintiff's counsel said they should rely on certain facts set forth in and confessed by the defendant's notice.

The defendant's counsel said these supposed facts were set forth in the notice merely by way of *inducement*, and prayed leave to strike them out.

Curia. It is immaterial whether the facts set forth in the notice are stated merely as inducement, or are substantial. They cannot be taken as evidence against the defendant. The notice under the general issue is simply to apprize the plaintiff of any special matters which the defendant shall rely upon in his defence or justification. It amounts to no confession in fact or by implication of law. If it did, the Court would certainly compel the adverse party to take the whole confession together, and not to select certain allegations of the notice as true, and put the defendant upon the proof of others.

Vermont Stat. vol. 1. p. 95. c. vi. s. 98.

In an action of defamation the *general* character of the plaintiff cannot be shown in evidence by defendant in mitigation of damages.

The defendant moved to show the general character of the plaintiff in mitigation of damages.

Smith v. Shumway.

Curia. It cannot be admitted.

Verdict for the plaintiff, 6 dollars.

The plaintiff moved to tax full costs.

Vermont Stat. vol. 1 p. 94, 95. c. vi. s. 97. and first proviso.

The appellant in an action of defamation, who on the appeal recovers under 7 dollars, can tax no more costs than damages.

Curia. The statute is express. There can be no greater costs than damages. Costs taxed at 6 dollars.

——— ———, for plaintiff.
Robinson, for defendant.

EBENEZER DWINELLS, Appellee,
against
JAMES AIKIN, Appellant.

ACTION for slanderous words.

For saying, with the usual allegations and innuendoes, "*Ebenezer Dwinells* is a perjured rascal: he has taken a false oath, and I can prove it."

General issue pleaded, and notice under the statute, that the defendant would give the truth of the words in justification, to wit, that the plaintiff, in the trial of a certain cause before a Justice's Court, appeared as a witness, and testified falsely.

The plaintiff proved the words to have been spoken, and rested.

In an action of defamation for saying, "The plaintiff is a perjured rascal, and has taken a false oath, and I can prove it," this being a direct charge of perjury, the defendant giving notice under the general issue, that he shall give the truth of the words spoken in justification, is held by the Court to the same proof as would sustain an indictment for perjury.

The defendant's counsel now offered to show the sessions and proceedings of the Justice's Court by *parol* testimony.

Dwinells v. Aikin.

Objected, That the Justice's Court is a Court of Record, and parol testimony of its session and proceedings is not the highest evidence the nature of the case requires.

Defendant's counsel. We do not consider ourselves held to the same strictness of proof in giving the truth of the words spoken in defence, as is required upon an indictment for perjury.

Curia. The defendant has not merely charged the plaintiff with false swearing, but he has charged him directly with *perjury*, and has explained his meaning in his notice under the general issue, to wit, in testifying falsely in a certain cause before a Justice's Court. If he would show the truth of the words spoken in justification, he must show the plaintiff to have been guilty of perjury in the technical sense of the term. He must show all that is necessary to be shown to support an indictment for perjury, to wit, that there was a Court of competent jurisdiction, a cause within that jurisdiction, an issue joined and tried, an oath administered by proper authority, and that the plaintiff appeared at such Court, and knowingly and wilfully testified falsely to a point material to the cause in issue. If the Court before whom the cause was tried is a Court of Record, which this Justice's Court is,* the record of its sessions and proceedings must be produced.

Laws of New-York, Greenleaf's edit. vol. 1. p. 445.

* The Justice's Court was holden within the State of *New-York*. It appeared that the Legislature of that State, on the 17th of *April*, 1787, gave civil jurisdiction to Justices of the Peace. By the act for the more speedy recovery of debts to

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The record was after some delay produced.

Verdict for the plaintiff, 46 dollars.

It appeared by the record of the certified copies of the case, that in the County Court, *Dwinells*, the plaintiff, had, by verdict of the Jury, recovered *five dollars damages, and that no costs had been taxed.*

Noah Smith, for the defendant, insisted, that no more than five dollars costs could be legally taxed in the County Court. He relied on the 97th section of the judiciary act, " that in all actions of the case for slanderous words, if the damages found and assessed by the Jury do not surmount the sum of seven dollars, the Court shall allow no greater costs than damages," and insisted, that this statute was binding upon every Court, distinctly and independently of every other jurisdiction; that there being a verdict found for the plaintiff under seven dollars in the County Court, costs should have been there taxed

Vermont Stat. vol. 1. p. 95. c. vi. s. 97.

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the value of ten pounds, first section, " Be it enacted, That from and after the first day of *June* next, all actions of debt, detinue, account, covenant, trespass, and trespass on the case, wherein the sum or balance due, or thing demanded, shall not exceed ten pounds current money of this State, shall be, and hereby are made cognisable before any Justice of the Peace, of any City or County of this State; and every Justice shall be, and hereby is respectively authorized and empowered to hear, try, and determine all such causes and actions according to law and equity, and shall and may hold a Court for the trial thereof, and is hereby vested with all such power and authority for the purpose aforesaid, as is usual in *Courts of Record* in this State, and shall sign all process to be issued out of such Court."

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under seven dollars; and when the case came by appeal to this Court, if the verdict had been for damages under seven dollars, then no greater costs than damages in this Court. But the Courts being thus made by the statute independent of each other in this particular, when damages have been found in the County Court for five dollars, and the same amount of costs taxed there; and on appeal, damages are assessed by the Jury in this Court at 46 dollars, the *full costs* accruing only in this Court can be legally taxed.

In an action for defamatory words, if the plaintiff in the County Court recover under seven dollars, and on appeal recover above seven dollars damages, he shall tax full costs in both Courts.

Sed per Curiam. The construction given by the defendant's counsel to the statute cannot be correct. The Legislature, with a view to put a salutary check upon actions of the case for slanderous words, where the injury sustained is trifling, have provided, that when the plaintiff in such actions shall recover by verdict of the Jury any sum under seven dollars, he shall be allowed no greater costs than damages; but they did not look to the primary or intermediate, but to the final judgment; and in the proviso to the section read, it is provided, that if the defendant appeal from such judgment, or review the cause, and final judgment shall be rendered for the appellee or reviewee, he shall recover full costs. The plain import of the statute is, that if the plaintiff recover by the first verdict under seven dollars, he shall have no greater costs than damages. The plaintiff is here punished for his presumption, and the defendant has the benefit of the security given him by the statute against responding a large sum in costs for a trivial injury done by him; and here he has his election to discharge this small judgment, or proceed further

with the cause. But if he will himself appeal or review the cause, and expose himself to further costs upon a trivial suit, and the event should be, that on the review or appeal, the plaintiff should recover a larger sum than seven dollars, he shall respond the full costs from the commencement of the suit; and he who of his own act has thus extended a suit has no right to complain.

To construe the statute to intend that the costs in the ratio prescribed must follow each verdict in each Court, would be to defeat its intent. The plaintiff is taught by the statute to be wary of instituting a suit of this nature for a trifling injury. The defendant is warned not to extend it. To oblige the plaintiff to tax his costs as commensurate with his damages on the first judgment, when the defendant impelled him to a second trial by appeal or review, and on which he proves to the satisfaction of the Court and Jury, that the injury he complained of was not trifling, would be to apply the reprehension of the statute to the unoffending party.

The statute also contemplates but one bill of costs. If the damage found or assessed by the Jury do not surmount the sum of seven dollars, the Court shall allow no greater costs than damages. The Court have always construed this to apply to the final verdict and judgment, and therefore all the costs taxed in such cases have been reduced to the damages then assessed, without any regard to such costs as were or might have been taxed at the lower Court, or upon a first trial in this Court; and to construe the statute otherwise would be in case wherein the plaintiff had two verdicts of five dollars damages each, to fine him

When, in an action for slanderous words, a verdict is found or judgment rendered in the County Court for the plaintiff, for a sum which does not surmount *seven dollars*, on a review or appeal entered, the County Court should not tax the costs until the ratio of taxation be found, which cannot be known until judgment.

the final verdict or

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ten dollars costs, which certainly would be in the face of the statute.

When in an action for slanderous words, a verdict is found and judgment rendered in the County Court for the plaintiff, for a sum which does not surmount seven dollars, the County Court, as in the present case, are correct in not taxing the costs until the ratio of taxation be found, which cannot be known until the final verdict and judgment.

The Court therefore consider, that in this case the plaintiff may tax full costs in both Courts.

David Fay and —— ——, for plaintiff.
Noah Smith and *Chauncey Langdon*, for defendant.

JOSIAH WRIGHT, Appellee,
against
DAVID, STEPHANUS, and JOSIAH PAGE,
Appellants.

Seisin of the land, or a mere naked claim to the crops standing and growing on the *terra in qua* the assault was committed cannot be given in evidence under the general issue in mitigation of damages in an action of assault and battery.

THE plaintiff declared in trespass for a violent assault and battery made upon him by the defendant in *Pownal*, on the 18th *July*, 1797, *ad damnum*, 3,000 dollars.

General issue pleaded and joined.

The defendant offered to show *seisin of the land, and property in the crops standing and growing thereon*, about which the dispute which caused the assault and battery arose *in mitigation of damages*.

Objected by the plaintiff. This showing does not amount to *son assault demesne;* but if it did, it is matter of justification, which ought to have been pleaded in bar, and cannot be admitted under the general issue.

Defendant's counsel. We do not contend that such showing can be admitted in justification under the general issue, but merely in mitigation of damages. In the case of *Bingham* v. *Garnault*, sittings in *London*, 5th of *April*, 1788, *coram Buller*, Justice, minuted in *Buller's Nisi Prius*, an action was brought against a captain of a ship for assault and battery and false imprisonment, who pleaded not guilty. "The defendant cross-examined the plaintiff's witnesses as to expressions used, by the which he would have *justified* the imprisonment, they tending to raise mutiny and disobedience." The defendant should regularly have pleaded *son assault demesne*, and upon *de injuria propria* replied, and joinder, the evidence of the mutinous expressions would have been properly before the Court; but it seems he pleaded the general issue; and the objection was taken, that expressions tending to raise a mutiny and disobedience on board his ship would amount to a justification in the captain, and ought therefore to have been specially pleaded. The Court nevertheless admitted what was said by the plaintiff at the time of the imprisonment, to be heard in mitigation of damages.

Found in *Ridley's* edit. p. 17.

Per Curiam. There are three modes of defence to the action of assault and battery.

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The first is by pleading the general issue, which denies the whole charges in the declaration.

The second admits the facts, but avoids the conclusion in the declaration, by alleging that they were done through inevitable accident. This ought regularly to be pleaded in bar, and so has been the practice in this Court; but it appears by the books, that such inevitable accident may be shown in evidence under the general issue.

The third is a justification of the alleged trespass, and must always be pleaded in bar.

The evidence offered by the defendant's counsel does not deny the allegations of the declaration, or excuse the facts of assaulting and beating the plaintiff. It does not even amount to a justification. Had it been pleaded in bar as such, the plea would have been clearly bad. The defendant offers to show seisin of the land in himself; but *possession only*, accompanied with such restricted acts as the law allows a man to do in defence of his possession, can amount to a justification.

It is no justification for an assault and battery, to plead that the assailant was defending his title. If a dispute of this nature exists, which cannot be settled by the parties, it is to be decided by Courts and Juries, and not by staves and blows, and breach of the public peace, and no evidence that the right or title to the land about which the dispute arose, and upon which the assault and battery ensued, can operate as any mitigation of damages.

Nor can a mere naked property in the crops standing and growing, without actual possession of the land, be pleaded in justification, or be given in mitigation of damages, under the general issue. The

crops attached to the freehold do not come within the principles by which personal property is held; but if they were considered as a chattel interest, it would be of dangerous consequence to society to suffer a party to justify or to even mitigate the damages in assault and battery, by showing that he claimed property in things in dispute, while in possession of another.

The law will not suffer a man to reclaim his own property, either real, *personal*, or mixed, by breach of the peace.

The case cited from *Buller's Nisi Prius* is not in point. The Court in that case admitted every thing that was *said at the time of the imprisonment* to be heard in mitigation of damages. In the present trial, every thing said at the time of the assault and battery, has been or will be received in evidence in mitigation of damages; "for every thing which passed at *that time* is part of the transaction on which the plaintiff's action is founded, and he cannot be surprised by such evidence." But he might be surprised by the admission of evidence of the defendant's seisin of the land, and property in the crops standing and growing thereon, about which the dispute arose, which, it is suggested, led to the assault and battery; for it is not evidence of any thing which passed at the time of the trespass alleged.

If the defendants thought such evidence available in their defence, they should have spread it on the record in bar. The plaintiff would have then been apprized of such defence, and have prepared himself to traverse the seisin of the land, or property in the crops, or by demurrer have shown such evidence impertinent.

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The evidence cannot therefore be admitted.

Verdict for plaintiff, 1,000 dollars. Costs, 178 dollars.

Fay, for plaintiff.
Darius Chipman, for defendants.

JETHRO KENNY *against* ELIAS KETTLE et al.

In an action of trespass for breaking and entering the plaintiff's house, and spoiling his goods, against seven defendants, one of whom pleads *son assault demesne* in bar, and traverse and issue to the country, and the other six plead severally the general issue, and all the issues go to the same Jury in the County Court, verdict that he who pleaded *son assault demesne*, and three others are guilty, and the *two other defendants* not guilty, to whom the plaintiff pays their costs; on the appeal of the found guilty, the Supreme Court ordered them to plead *de novo*.

THIS was an action of trespass for breaking and entering the plaintiff's house in *Pownal*, and destroying his goods.

In the County Court, defendant *Kettle* pleaded *son assault demesne* in bar; replication, and issue to the country.

Six other defendants pleaded the *general issue*, with notice that they should severally give in evidence that the plaintiff first assaulted them; in this, that on the day and place of the supposed trespass, the plaintiff was assaulting and battering the defendant *Kettle*, and destroying his goods; which to prevent and to keep the peace, they, as the servants of the said *Kettle*, lightly imposed their hands on the plaintiff, and this is the trespass complained of. Joinder.

All the issues went to the same Jury, who found *Kettle* and three other defendants guilty, and the others not guilty.

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The defendants found guilty, appealed. The plaintiff did not enter his appeal against the others, but paid them their costs taxed by the County Court.

The Court in this cause, on motion, ordered the defendants in this Court to plead *de novo*.

Robinson and *Fay*, for plaintiff.
Chauncey Langdon and —— ——, for defendants.

ISAAC BOWEN, Appellee,
against
HOSEA FULLER, Appellant.

Vermont Stat. vol 1. p. 369. c. xxxvii.

In an action brought to recover trebledamages on the first section of the act more effectually to prevent trespasses in divers cases, it is necessary for the magistrate issuing the original process, to make a minute on the writ, under his official signature, of the day, month and year of his signing the same.

THIS was an action brought to recover treble damages, founded on the first section of the act more effectually to prevent trespasses in divers cases.

Verdict for the plaintiff in the County Court.

And now defendant, by his attorneys, moves the Court here, that the aforesaid action, and proceedings thereon, may be dismissed and quashed; for that the aforesaid action is brought to recover a forfeiture and penalty given by a certain statute law of this State, entitled, "an act more effectually to prevent trespasses in divers cases; and for that the Justice or magistrate who signed the original writ in said action or suit, did not, at the time of signing thereof, make a minute in writing under his official signature, on said original writ, of the day, month, and year when the same was by him the said Justice signed,

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them, obligating the faithful discharge of their trust.

The form of this bond is prescribed in the statute. It runs immediately to himself in his official capacity, and to his successors in office, and is conditioned,

First. That the administrators shall make or cause to be made a true and perfect inventory of all and singular the goods, chattels, rights, credits, and estate of the deceased, which have or shall come to his knowledge or possession, or the possession of any other person for him.

Secondly. That they shall exhibit such inventory into the registry of probate by a day therein prescribed.

Thirdly. That they shall well and truly administer, according to law, the same goods and estate.

Fourthly. That they shall make a true and just account of their administration by a day prescribed them.

Fifthly. That all the rest and residue of said goods and estate, which shall be found remaining on their account, (the same being first examined and allowed by the Court of Probate,) they shall deliver or pay unto such person or persons respectively as the Court of Probate, by their decree or sentence pursuant to law, shall limit and appoint.

Sixthly. That if it shall afterwards appear, that the deceased made a last will and testament, the administrators shall, on request, the approbation of such testament being first had and made, deliver their letter of administration into the Probate Court.

Vermont Stat. vol. 1. p. 129.

This bond, by the 26th section of the probate act, is to be given to the Judge of Probate, and his suc-

cessor in office, without any mention of *his assigns*. By the tenor of this bond, the Judge of Probate has the inherent and full right to prosecute for the breaches of any of its conditions. This he may do of his own official act.

But it seems, by the 103d section of the probate act, provision is made, that, on application to the Judge of Probate by any person who has been injured by the breach of the conditions of such bond, requesting such bond to be put in suit, it shall be his duty, on such applicant's giving good and sufficient security to his satisfaction, to prosecute such suit to effect, and, in case of failure, to pay all damages and costs, to cause an action to be brought on such bond, and the Judge of Probate shall certify to the Court the name of the person making such application, who shall be taken and deemed the prosecutor in such action. *This* the Judge of Probate in the present action has not done, and the present rule is filed to compel him to do it.

Vermont Stat vol. 1. p. 162.

The question therefore is, whether the 103d section of the probate act is to govern all suits upon administration bonds, and whether it destroys the inherent official powers of the Judge of Probate, which he derived from common law, from the 6th section of the probate act, and from the tenor of the bond itself.

We contend that the Judge of Probate is required by the 103d section of the probate act, to certify the name of the person injured by the breach of the conditions of the administration bond *only*, when security for costs and damages has been made to his satisfaction, and application has been made to him to commence a suit. But if the security is not satisfac-

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tory, this does not do away his power to maintain a suit upon the bond as of his own official act.

It appears that this action has been commenced by the mere motion of the Judge of Probate; for it is apparent from the record, that no application has been made to him by any person, and that no security has been taken by him to respond damages and costs in case of failure.

It must therefore be considered as an action brought by the Judge in his official capacity for some breach of the conditions of the bond, of which the injured would not complain, or which more particularly affected him in his office.

That the Judge of Probate did not cause this action to be brought on application of any person injured, is further obvious; for he could not cause the action to be thus instituted *unti*, the applicant had given satisfactory security to prosecute to effect.

The Judge of Probate is required by the rule to show cause why he should not certify the name of the person applying to him to commence the suit. How shall this be done, if no such person exists? But if such person exists, can the Judge now certify? If he can and does, can the Court, in the language of the statute, take and deem such person to be prosecutor in the action? It is manifest they cannot by the statute, for they cannot deem such person to be prosecutor, unless security be given to the Judge of Probate for responding costs and damages. The Court cannot take such security; for it must be taken to the satisfaction of the Judge of probate. He cannot demand it *now*; for he could only demand it on application to commence the suit.

That occasions may happen, where, if the Judge of Probate did not institute the suit as by his own motion and official act, great injustice might be suffered, is apparent.

Who are the persons who may be injured by the breach of an administration bond?

First. The creditors to the intestate.

Secondly. The heirs and the widow.

Suppose there are no creditors, or, if any, that the administrator has colleagued with them, and they will not apply to the Judge of Probate; or if, by the machinations of the administrator, the widow and heirs are so impoverished as that they are unable to give security to respond the costs and damages, or to command funds to maintain the suit.

Or, lastly, suppose a debt due to the State. Who should apply to the Judge of Probate on behalf of the government? Would security to respond costs and damages in such case be required?

Would it not, in all such cases, and many others which might be mentioned, be the duty of the Judge, of his own mere official motion and act, to institute an action upon breach of the conditions of an administration bond? Would the Court in such cases require the name of the applicant to be certified?

What the motives were which led the Judge of Probate to institute this action cannot *now* be known, as the rule was thrust in immediately after the bond had been read on *oyer*, and before the breaches of the condition of the administration bond declared upon had been discovered by assignment.

We shall not detain the Court further than merely to notice a parallel statute case:

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A prisoner for debt, in order to obtain the liberties of the prison, is required by the statute to execute a bond with sufficient surety to the sheriff. By an after provision of the statute, such bond must on demand be assigned to the creditor, who may maintain an action on the same; but if the sheriff does not assign the bond, has this ever been construed to do away the inherent right of the sheriff to maintain an action upon the bond?

We therefore trust the rule will be discharged.

Fay, e contra, read the 103d section of the probate act,* and observed—

* That on application to the Judge of Probate by any person who has been injured by the breach of any conditions contained in the bond taken by such Judge, of any executor or executors, administrator or administrators, as before directed in this act, requesting such bond to be put in suit, it shall be the duty of the Judge to whom such bond was or shall be taken, on such applicant giving good and sufficient security, to the satisfaction of such Judge, to prosecute such suit, and to answer and pay all damages and costs in case of failure to prosecute to effect, to cause an action to be brought on such bond, and shall certify to the Court before whom such action shall be brought, the name of the person making such application, who shall be taken and deemed to be the prosecutor in said action; and if the defendant or defendants in such action shall plead performance of the conditions of such bond, the prosecutor may in reply assign as many breaches affecting his right and interest thereon as he shall think fit; and the Jury, upon trial of such issue or issues as shall be thereupon put to them, shall find and assess damages for such breaches as the prosecutor shall prove, and on such verdict the Court shall enter up judgment for the whole penalty of the bond, and execution shall issue in favour of the prosecutor for such sum as the Jury shall

We consider, by the true construction of the statute, that the Judge of Probate never can institute or maintain an action upon an administration bond, upon his own mere motion, or for his mere official benefit.

The bond is executed to him for the benefit of others.

There is no possible breach of the conditions of it which can affect him separately, without an injury to those for whose benefit it was executed.

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have found in damages and costs; and if judgment in such action shall be rendered for the plaintiff, on demurrer, on confession, by default, or *nil dicit*, the prosecutor may assign as many breaches as aforesaid as he shall think fit, the truth whereof shall be found, and the damages sustained be assessed according to law, and execution shall issue in favour of the prosecutor for the amount of such damages and costs, and the judgment shall remain as a security for any further or other breaches of the condition of said bond; and any person thereafter, who shall be injured by any breach of the condition of said bond, or the executors or administrators of such person may prosecute a *scire facias* on that judgment from time to time, in his, her, or their own name and right, or in the right of those whom they represent, against the defendant or defendants, his, her, or their executors or administrators, and may thereupon assign as many breaches, affecting his right and interest, as he shall think fit, and thereupon damages shall be assessed and execution issue in favour of such last-mentioned prosecutor as aforesaid; and if the plaintiff or plaintiffs, in any of the actions aforesaid, shall not prove a breach or breaches of the condition of said bond, affecting their own right and interest therein, he, she, or they shall pay reasonable costs to the defendant, of which he, she, or they may have execution in due form of law.

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If the Judge of Probate should recover in an action of this nature, instituted and maintained upon his mere motion without application of any person injured, what must be the judgment? If it is replied, the whole penalty of the bond, this does not meet the question, for the bond must be subjected to Chancery. And what must be the judgment in Chancery? If this difficulty be overcome, what shall be done with the avails of the judgment? Is the Judge to pocket the money? It cannot go to the person immediately injured; it cannot be distributed among the heirs or creditors; for all distribution to them must be made through the medium of the administrator, and it would be difficult to consider a sum of money in the hands of the Judge of Probate, the avails of a judgment recovered by his mere official act against the *administrators*, as assets in *his* hands.

These administration bonds, given nominally to the Judge of Probate, though in reality to those concerned in an intestate estate, are deposited in the archives of his office. As a Judge in his Court, he can do no more than the Judges of this or any other Court. He cannot, even if he sees an injury sustained, proceed, *ex officio*, to remedy it, without legal application for redress. And it must be observed, that whenever an action of this nature is brought in his name, in every stage of progression in the suit, the action will inevitably point to some person injured, or supposed to have been injured, and never will indicate an injury sustained by the Judge in his mere official capacity.

If the administrator has not made an inventory, or has failed to exhibit it in time;

If he does not truly administer, or render a true account of his administration;

If he does not deliver and pay the residue, according to the decree of the Probate Court;

Or refuses to surrender his letter of administration, in case a last will and testament is found—Who is injured? the Judge? No; but the creditors and widow and heirs.

If we had pleaded, that we had in all things kept our covenants, the plaintiff would have been obliged to assign a breach; and what breach could he have assigned, which would not have directly pointed to the applicant or applicants for this prosecution?

If the breach had been the not making any or a true inventory, this might have been an injury to all concerned in the intestate's estate.

If the administrators did not truly deliver and pay the *residue* to the heirs, or any of them, he who had not received his proportion would have appeared to be the real prosecutor.

If they did not surrender their letters of administration upon a will's being found, the executor, devisees, or legatees, would have appeared as the persons injured. But in what case could the Judge of Probate say he was himself injured in his official capacity? The position is therefore assuredly correct, that in no case can a Judge of Probate institute a suit upon an administration bond, for his official benefit, or his mere motion.

The statute, by the term, "on application to the Judge of probate," intends that these suits shall be brought in no other way; for in no other way can several chanceries be taken on the same bond, and applied as remedial to several injuries.

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By the law which empowers the law courts to exercise chancery powers, a bond once chancered can never be chancered again. If this action is indeed brought by the Judge without application of any one injured, and the defendants should move to chancer the penalty, and the Court should chancer the penalty to such sum in damages as the Judge should make it appear he has in his official capacity sustained; or if, as has been suggested, this action is brought by the Judge of Probate through a commiseration for some heir impoverished by the chicanery of the defendants, without any record of any application, or any bonds taken to prosecute to effect, and the Court proceed to render judgment in it, and the bond is chancered to a sum adequate to the injury sustained by such individual heir, it is certain it will not be done under the 103d section of the probate act; and the discharge of such judgment by the defendants will for ever put the bond to rest: for a judgment on the penalty and subsequent chancery may for ever be pleaded in bar to a bond unless saved by some statute, and, as in relation to actions on administration bonds, no other statute exists.

A case is put of a government debt, in which it is said no application can be made to the Judge of Probate, and no bonds for the responding costs can be taken; and a conclusion drawn, that in such case the Judge from necessity must institute an action of this nature on his mere motion.

We consider that the government has its attorneys appointed to represent the State in such cases, and the State Attorney will be the applicant. This statute must be then construed respecting the recognisance for costs, like all other statutes which have for

their objects the concerns of the citizens, but in which the pecuniary interests of the State may possibly be involved.

If the rule is discharged, and the action proceeds in the name of the Judge of Probate, without the name of any prosecutor being certified, and we should have judgment for our costs, who is to respond them? Would not this be the first instance where costs are taxed substantially against a judicial officer of government acting in his official capacity? The section under consideration provides against this; for on the prosecutor's name being certified by the Judge of Probate, and judgment for the defendants for their costs, resort may be had to the bonds directed to be taken for the especial purpose of securing the Judge from payment of costs.

It is objected, that the demand in the rule upon the Judge of Probate to certify the name of the applicant, cannot now be made; for the application of the person injured to the Judge must have been made, and he have certified before the commencement of the suit; and that this was done does not appear by the record.

We presume such application has been made, but the Judge of Probate has omitted to certify it. The time when the Judge shall certify is not pointed out in the statute.

It is further objected, that if the Judge should now certify upon the rule's being made absolute, the Court cannot admit the applicant to prosecute, for there are no bonds for the prosecution taken.

We presume such bonds have been taken. If they have not, this has no relation to the present rule, which merely calls upon the Judge to certify the

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name of the person applying to him to put the bond declared upon in suit. Whether, when this person is named, he will be so circumstanced as to be enabled to prosecute the suit, is a question to be decided as between us and the applicant, in which the present plaintiff has not now, and certainly will not then, have any interest.

If, however, bonds for prosecution have not been taken, we may waive any objection, and proceed to defend without them; but we consider that the Court may, under the 45th section of the judiciary act, in this or any other suit *pending*, order bail for prosecution to be entered.

Vermont Stat. vol. 1. p. 71.

It is objected, that the bond for the prosecution cannot be taken by this Court, as it must have been taken to the *satisfaction* of the Judge of Probate; but it will not be contended, that, if the Judge had considered bail to be satisfactory, this Court could have increased the quantum, or have ordered new bail to have been entered.

The case of bonds for the liberties of the prison we conceive to be by no means parallel. The bond is there taken to the sheriff for his own benefit, and not for that of others. It is his duty to keep his prisoners safely. When they are admitted to the liberties he is to take sufficient bonds, and is responsible for their sufficiency. These bonds may be assigned to the judgment creditor, but the sheriff is not obliged, *on application*, to assign them. In case of escape he may do it, and no action in such case shall be maintained against the sheriff for any escape, until the sufficiency of such bond has been tried in a suit brought by the creditor as assignee of the sheriff,

Vide vol. 1.

but the sheriff may refuse to assign, in which case he exposes himself immediately to an action for the escape, and may recur to the bonds for his own security; but in all cases such bonds are taken for the personal security of the sheriff, and not for the mere benefit of the creditor, whose eventual security is the sheriff himself. It is right, then, that the sheriff should control the suits on such bonds. But what personal interest has the Judge of Probate in administration bonds? Is he any ways responsible for their sufficiency?

We shall conclude by offering one more, which is an equitable reason, why the Judge of Probate should certify the name of the applicant, that we may know our adversary, in which case this Court will always favour the amicable accommodation of the suit.

Could we know our adversary we might accord with him. We might submit the controversy to arbitrators, or we might refer the suit under a rule of this Court.

But can the Judge of Probate accommodate, submit to arbitration, or refer?

We therefore trust the rule will be made absolute.

Smith, for the plaintiff, arose to reply, but was interrupted by the Court.

Curia. Upon recurrence to the files, we find this action was commenced on the 2d of *May*, 1794, and the bond declared upon was executed the 5th of *July*, 1789. The present probate act was passed on the revision of the statutes, *March* 10th, 1797. The

Vermont Stat. p. 54. Harw. edit.

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statute which governed at the date of this bond, and at the impetration of the writ, is the act for the settlement of testate and intestate estates, passed *March* 8, 1787. This statute does not contain any provisions similar to those of the 103d section of the present act. By our practice under the act of 1787, actions upon administration bonds were always brought in the name of the Judge of Probate, and apparently on his mere motion; no applicant was ever certified by the Judge as the prosecutor. This act, and the practice under it, undoubtedly caused great inconveniences to the Judge, the obligors in such bonds, and the persons injured by the breach of them. Some of these inconveniences have been mentioned by the defendant's counsel, and others recollected by the Court. To remedy such inconveniences, upon the revision of the probate act in 1797, the 103d section was inserted. At the time of the passing the present probate act, the act of *March* 8, 1787, was repealed by the general repealing statute, the 3d section of which enacts, "that the aforesaid repealed acts or laws shall be in full force as to all matters and things done or transacted during their existence, to which they relate, to all intents and purposes, as though this act had not been made, and all such matters may be prosecuted, commenced, done, and completed, at any time hereafter, pursuant to the same laws."

Vermont Stat. vol. 2. c. cxi. p. 124.

Now, whether this clause applies to the date of the bond declared upon, or the teste of the writ, is immaterial, as it appears both are anterior to the present revised probate act.

The Court are therefore of opinion, that the present action must be subjected to the statute of *March* 8,

1787, and is not within the provision of the 103d section of the statute of *March* 10, 1797.

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Rule discharged.

Robinson and *Smith*, for plaintiff.
Fay and *Hall*, for defendants.

FRANKLIN, ROBINSON, & Co.
against
ELI BROWNSON, Administrator.

THIS was an action of *assumpsit* upon a promissory note made by the intestate.

Plea in bar, that the estate had been represented insolvent, and this claim barred by the 83d section of the probate act, as not having been exhibited to the commissioners.

Vermont Stat. vol. 2. p. 152.

Replication, that the claim had been exhibited to the commissioners. Traverse, and issue to the Jury.

The plaintiffs now offered to show in evidence by a witness, that the defendant had confessed to him that the note had been exhibited to the commissioners as a claim against the intestate's estate.

Per Curiam. This is not the highest and best evidence the nature of the case admits. The commissioners of insolvency are obliged to report to the

Ib. p. 53.

In an action against an administrator upon an estate represented insolvent, declaration upon a promissory note made by the intestate, the Court will not admit parol testimony to show that the note had been exhibited to the commissioners as a claim against the insolvent estate.

Franklin, Robinson, & Co. v. Brownson.

Judge of Probate, on oath, as well a list of all the claims by them allowed, as a list of such as have been *presented* and disallowed. Here is written evidence of a high nature, as it becomes part of the record in the registry of probate. If parol testimony could be admitted, the oath of one or more of the commissioners would be more conclusive than the confession of the administrator.

The evidence cannot be admitted.

Verdict for defendant.

C. Langdon and *S. Camp*, for plaintiffs.
D. Fay and *L. Hall*, for defendant.

Note. The plaintiffs at this term moved a rule upon the defendant, to show cause why the verdict should not be set aside, and a repleader awarded. Rule granted, and argued and decided, *Bennington* County, *Manchester July* adjourned term, A. D. 1803. Vide *post*.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

BENNINGTON COUNTY,
BENNINGTON MAY ADJOURNED TERM,
A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

SIMEON HATHAWAY, Junior,
against
STRONG, PORTER, & Co.

ACTION of account against the defendants as bailiffs and receivers.

The plaintiff demands that the defendants render a reasonable account for moneys, &c. received by them

Upon a submission of controversies by bond, and revocation by deed before award made, if the award be afterwards made, and it directs a certain sum of money, with the costs of arbitration, to be paid by one party to the other, and releases to be executed by both at a certain day, on the award's being pleaded in bar to an action for the demands submitted, and replication of the revocation pleaded, the plaintiffs having paid the sums awarded, and the mutual releases not being executed, such payment will not be considered as a waiver by the plaintiff of his revocation of the submission.

Hathaway v. Strong, Porter, and Co.

from the 1st of *March*, 1793, to the 28th of *April*, 1795; and declares, that he and they were partners in a furnace in *Bennington*, and that they received as his partners, moneys, &c. of the company, to the amount of 10,000 dollars, for which, &c.

Defendants pleaded in bar, that the copartnership was dissolved by mutual consent on the 23d of *April*, 1795; and on the same day plaintiff and defendants, by their several bonds duly executed, in the penalty of 5,000*l.* lawful money, submitted all controversies, and especially the controversy respecting the furnace company concerns, to *Ebenezer Walbridge*, *David Haynes*, and *Ephraim Smith*, their award, or the award of any two of them, to be made in writing under seal, to be delivered to the parties on the first day of *August*, 1795; and aver, that on the first day of *August*, 1795, the three arbitrators made and published their award conformable to the submission, and it was ready to be by them delivered to the parties the same day. The award was spread on the record, and it appears that the arbitrators awarded, that the now plaintiff, *Hathaway*, should pay to the firm of *Strong*, *Porter*, & *Co.* 39*l.* 14*s.* 2*d.* the balance found, and 13*l.* 10*s.* costs of arbitration, on the 1st day of *September* then next following, and that the parties should make and execute general and mutual releases upon the payment of said sums.

That on the said 1st day of *September*, the award being in full force, the plaintiff paid the defendants the said several sums of 39*l.* 14*s.* 2*d.* and 13*l.* 10*s.* which they received by the consent and agreement of the plaintiff, in full accord and satisfaction of said award.

Plaintiff replies, that he ought not to be barred, because he says, after confessing the submission,

that on the 1st of *August*, 1795, before any award was made, he, by his deed duly executed and delivered to the defendants, and made known to said arbitrators, disannulled and revoked said submission, *et hoc*, &c. wherefore, &c.

To this replication defendants demurred. Joinder.

Langdon, for defendants, contended, that the replication was insufficient. He did not deny that a party to a submission had power to revoke it before an award made, but insisted, that the satisfaction made by the plaintiff, in paying to the defendants the several sums of 39*l.* 14*s.* 2*d.* the sum awarded, and 13*l.* 10*s.* costs of arbitration, was a waiver of the plaintiff's revocation.

That even if the award was made void by the revocation, yet if performance be alleged, a void award may be pleaded. *Kyd on Awards*, p. 242—246.

Chipman, *e contra*, insisted, that the *void award* mentioned by the systematic writer cited, meant an award intrinsically void; for where an award is not within the rules of law, or not strictly conformable to the submission, and might therefore be set aside, yet if the parties will proceed to comply with it by their own voluntary acts, it will amount to an accord and satisfaction, which has for its grounds the award. The opinion of the arbitrators in the form of an award has, then, no efficacy as such, but is a mere memorandum of such things as are agreed to and accepted in accord and satisfaction. But a revocation of the submission excludes the idea of any award, either void or valid.

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That if the compliance with this supposititious award by the plaintiff by the payment of the money, could be considered as amounting to an accord grounded on such award, yet the defendants never having complied with the award on their part by executing a release to the plaintiff, it could not amount to a satisfaction; for an accord must be executed to avail, otherwise there will be no remedy for a non-performance. *Com. Dig.* vol. 1. p. 134. b. 4. *Allen* v. *Harris.* 1 Ld. *Raym. Rep.* p. 122. *James* v. *David.* 5 *Durnf.* & *East's Rep.* p. 141.

Defendants' counsel, in reply, insisted upon the revocation of the submission having been retracted on the payment by the plaintiff of the money awarded. That although the defendants had not, in pursuance of the award, released to the plaintiff on receipt of the money, yet the demand for such release existed and might be enforced in the Court of Chancery, or the plaintiff might have his damages by an action upon the bond of submission. It is true, that where an *accord* is to do several things by each party, if all are not done the accord will not be good, because no action can lie to compel the performance of that which remains to be done: but not so in arbitrament; for it is laid down by the Court in *Allen* v. *Harris*, " that an arbitrament is like a judgment, and the party may have his remedy upon it."

Opinion of the Court.

The legal moot in this cause is narrowed to a single question: Did the plaintiff *Hathaway*, by paying the several sums mentioned in the plea in bar as

awarded by the arbitrators, do away the effect of his revocation of the submission as set forth in his replication?

The Court are decidedly of opinion that he did not. The revocation was made with equal formality with the submission, and before the award was published; and the subsequent award being published by those who had no authority to make it, can be of no force.

If the defendants meant to avail themselves of the plaintiff's acquiescence in this baseless award, so as to make it amount to an accord and satisfaction of the controversy, they should have alleged an acquiescence on their own part. The arbitrators awarded, that mutual and general releases should be executed by the parties to the submission on payment of the money, and assigned a day on which they should be executed. The defendants do not in their plea set forth, that they on their part have executed, or even offered to execute such release; and they come with an ill grace to enforce an award upon the plaintiff, with which they have not themselves complied, or offered to comply.

The Court are not prepared to say, that this revocation might not have been retracted, or that a full and complete compliance with an award made subsequent to a revocation by all parties in all things would not have amounted to an accord and satisfaction of the matters in controversy. Certainly, if parties agree understandingly to settle a controversy, and carry such agreement into effect, the Court will enforce such agreement; but this does not appear to have been the case here.

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Let judgment be entered, that the plaintiff's replication is sufficient, and that the defendants do account with the plaintiff.

Robinson, *Fay*, and *Chipman*, for plaintiff.

Langdon, *N. Robinson*, and *A. Selden*, for defendants.

JONATHAN BLACKMORE, Appellee,
against
DAVID PAGE, Appellant.

ACTION on book account.

The plaintiff filed his declaration in the County Court, *Manchester June* term, 1800, under the 93d section of the judiciary act, and demanded 83 dollars to balance book accounts.

Vermont Stat. vol. 1. p. 92, 93.

The defendant prayed *oyer* of the book account, which was read to him.

The account exhibited sundry items of book charges, for stone, brick, rails, masons' work, days' labour, and work with cattle, commencing *March* 15th, 1796, and concluding *October* 18th, following;

Which being heard and read, the said *Page* defends, pleads, and says, that he ought not to account with him the plaintiff, because he says, that the aforesaid articles, property, and labour, shown in *oyer* as

If a plaintiff declare upon a promissory note, and the defendant files a declaration on book account, under the 93d section of the judiciary act, it is no sufficient bar to such declaration, that the items in such book account were received by the plaintiff in pursuance of an agreement by which the amount of them was to be allowed on the promissory note, as the statute object in filing the declaration on book account is merely to liquidate the account, that the judgment recovered under it may be pleaded in set-off to the plaintiff's demand upon the promissory note.

aforesaid, were done, had, and delivered, in pursuance and in consideration of a certain lease or agreement made and executed at *Pawlet*, in *Rutland* County, by and between the plaintiff and defendant in writing, bearing date the 9th day of *June*, 1796, subscribed with the proper hands of the plaintiff and defendant, and then and there delivered to the plaintiff, in and by which said writing it was agreed, by and between the plaintiff and defendant, that the defendant should, and thereby did, lease, rent, and to farm let to the plaintiff his the defendant's then farm or lot of land lying in *Pawlet* aforesaid, together with the buildings thereon standing, for the term of one year from the first day of *April*, 1796, to be fully completed and ended, the plaintiff yielding and paying to the defendant the yearly rent of 73 dols. 33 cts. the payment of which said sum of money was then and there secured by the plaintiff to the defendant by his the plaintiff's promissory note in writing then and there executed and delivered by him the plaintiff to him the defendant; and it was then and there further accorded and agreed by the plaintiff and defendant, in and by said written agreement, that the plaintiff should occupy and use the said farm according to the rules of good husbandry, and make necessary fences and repair the buildings thereon, so far as to make them comfortable and convenient, and in consideration of such repairs having been made and done by the plaintiff, the plaintiff to be allowed and paid a reasonable sum as price therefor, in part payment of the note given as aforesaid to secure the payment of the rent aforesaid, when thereunto requested, as by said written agreement in the

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hands and possession of the plaintiff, appears; and the defendant avers, that said note of hand still remains unpaid and unsatisfied, and that all of said articles and services were had and delivered only in pursuance of said agreement, and the defendant has ever been ready to allow a reasonable sum to the plaintiff for the said materials and services, according to the tenor and effect of the agreement made and entered into as aforesaid, and this he is ready to verify, and thereof prays judgment if the defendant ought to account with the plaintiff in manner and form aforesaid, and that he may have his costs.

To this plea plaintiff demurred, and the County Court rendered judgment in his favour.

The cause came by appeal to this Court, and after several imparlances, the demurrer was argued and decided the present term.

Counsel for the demurrant. This is not an action of account against the defendant as our bailiff and receiver, which has gone into disuse in *England*, and seldom used with us, and therefore not subjected to any rules of practice, or decisions applicable to such actions; but it is an action *sui generis*, founded upon our statute law. We can therefore obtain no light from the *English* authorities, as the decision must depend entirely on the true construction of our own statute.

This is a declaration filed by the present plaintiff in the County Court on book account, in order to obtain a liquidation of his account, that the judgment in his favour might be pleaded in set-off to a demand, for the recovery of which an action was then pend-

ing in the same Court in which the present plaintiff was defendant, and the adverse party plaintiff.

This process grew out of our statute of offset. By the construction of that statute, a book account could not be pleaded in set-off to an action of the nature of that then pending; to remedy which the Legislature provided, by the 93d section of the judiciary act, "that if any action shall be pending in either of the Courts aforesaid, and the defendant or defendants shall have any just demand *on book* against the plaintiff or plaintiffs, which cannot be pleaded as an offset as aforesaid, it shall be lawful for such defendant or defendants, on or before the third day of the first term of the Court in which by law he, she, or they, is or are required to appear, to file in the same Court in which such action shall be pending as aforesaid, a declaration setting forth the nature of such demand, according to due form of law; which declaration so filed shall be sufficient notice to the adverse party to appear and answer thereto; and the Court in every such case shall proceed to the trial on such declaration previous to the trial of the original action; and if the defendant shall recover on such declaration, the sum so recovered shall be pleaded as an offset against the original plaintiff's demand, as is above provided; and if the defendant or defendants, filing such declaration as aforesaid, shall fail to substantiate or prosecute the same to effect, the plaintiff or plaintiffs in the original action shall be entitled to recover twelve per centum per annum interest thereon as damages occasioned by such delay, and single or double costs, in the discretion of the Court before which such original action shall be finally determined; and at the time of filing such declaration,

Vermont Stat. vol. 1. p. 92, 93.

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such defendant or defendants shall become recognised before the Court for the prosecution of such declaration, in such sum as the Court before which the original action is pending shall direct.

"Provided always, that the defendant or defendants, in such declaration on book, shall on motion be entitled to one continuance of the same action, and the same proceedings shall be had thereon in all things, as though such action had been entered in Court in the usual form."

But the plea in effect says, that we shall not have the privilege of this statute provision; for that the materials and services charged on our book as exhibited in *oyer*, are included in a special agreement in writing between the parties, and the amount by such agreement is to be applied in payment towards the discharge of the promissory note made for the rent of the farm mentioned in the written agreement.

We do not wish to apply the judgment to be obtained on our book account otherwise. Our object in filing this declaration is not to avoid our contract, but merely to liquidate our account, that we may be better enabled to fulfil it; for the action pending in the County Court, which enabled us to file the present declaration, is brought upon the same promissory note comprehended in the agreement as set forth in the defendant's plea.

When the then plaintiff brought his action on this promissory note, how should we have shown that we had carried the contract into effect on our part? Would the Court have permitted us to have pleaded an unliquidated account in discharge? If we had attempted to have shown it in payment of the note under the general issue, would the Jury have audited

our account? or were we not obliged to file this declaration preparatory to a plea in offset?

It will be observed, that when we recover our judgment, it can be applied in no other way than in offset to the original plaintiff's demand, contained in the promissory note. When we obtain a judgment, we cannot have execution on such judgment. It can only be applied in set-off to the now defendant's demand, made in his action pending.

If the plea is sufficient, and our present action consequently quashed, the same plea will be always good, and how are we ever to recover?

It will be noticed, that our demand on book is 83 dollars, and the defendant's promissory note but 73 dols. 33 cts. If we could have shown our book account in payment of the note, what should have been done with the balance in our favour? Could we have recovered that otherwise than by the operation of a plea in offset, the verdict in which case shall be such sum or sums as shall be found in arrear from either party.

Vermont Stat. vol. 1. p. 92. s. 92.

Langdon, e contra. Parties have a right to make their own contracts, and so to modify them as to take them out of any statute provision. The whole object of the common and statute law is to carry the designs of the parties to a contract into effect. In implied contracts the law will appear to a superficial observer to impose something not included in such contracts; but its object here is merely to carry the designs of the parties into effect, the law raising a presumption, that the parties have done what the reason of the thing required them to do, according to the common principles of justice; *ex gratia*, when

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goods are sold and delivered, though no express promise can be proved, the law presumes that the purchaser engaged to pay for them at a fair price. So, when money is to be paid, or specific articles delivered, and no time of payment, or place of delivery, is expressly stipulated, the law will presume that the parties agreed on the most reasonable time and place. So, if one sells another goods, or labours for him, and charges the same on book, the law will presume a promise in the purchaser to pay for them, and an action will lie either of *insimul computassent* at common law, or upon our statute.

Vermont Stat. vol. 1. c. xviii. p. 236.

But if the parties, aside of this, will make a special contract, especially if they reduce it to writing, the law will carry their contract into effect; not according to the rules of right reason, or the common principles of justice, but agreeably to their own express stipulations.

The defendant here leased his farm to the plaintiff for a year. The plaintiff gave him his promissory note for the amount of the rent. Repairs were necessary to be made on the farm, and they contracted that the tenant should make such repairs, and be allowed the expense out of the promissory note. The defendant must have made some memorandum of the work and materials done and expended in the repairs. He has done this on his day-book; but it is still not a book account; or if it be considered as a book account, it is not within the purview of the 93d section of the judiciary act. The words of the statute are, "that if any action shall be pending, &c. and the defendant or defendants shall have any just demand on book against the plaintiff or plaintiffs, *which cannot be pleaded as an offset as aforesaid*, it shall be lawful for

such defendant or defendants, on or before the third day of the first term of the Court in which by law he, she, or they is or are required to appear, to file in the same Court a declaration." Here it is apparent that it is not all demands on book indiscriminately upon which declarations may be filed, but only such as cannot be pleaded in offset.

We contend that this is not such a demand as a declaration might be filed upon it and pleaded in offset;

First. Because the parties had agreed by special contract in writing, that it should operate, not as an independent demand of the present plaintiff's, but should be especially applied to the discharge of the promissory note.

Secondly. That it might have been shown in payment of the note, under some issue carved out of the suit upon it.

And this is the ground of our plea. We expected to have met this demand, and were disposed to allow the amount actually due towards the discharge of the promissory note; but the present plaintiff has exposed us to the costs of another suit by filing this declaration.

Further, if our plea is overruled, and judgment against us to account, auditors must be appointed, and before them the plaintiff may substantiate his book charges by his own oath under the statute. This was no part of our contract. Therefore it is not the mere liquidation of the account we oppose, but the expensive and tedious mode of effecting it.

Vermont Stat. vol. 1 c. xviii. p. 236.

It is said the plaintiff's demand surmounts our promissory note, and if he had shown it in payment,

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it is inquired, what would have become of the surplus?

It will be observed, that, deducting those charges in the account, under date anterior to the lease, there will not remain sufficient to discharge the note and interest accruing upon it.

If it should be replied, that if such be the case there is then a part of the plaintiff's account independent of the contract, and so the action may be maintained, we remark, that such part will not amount to a sum within the jurisdiction of the Court; for it never has been contended, that a party might file a declaration on book account for a sum of which a Justice of the Peace has exclusive jurisdiction.

It is further inquired, in what mode the present plaintiff shall recover his demand, if our plea is ruled sufficient, and his action be quashed? The answer is obvious. Our action upon the promissory note has been suspended by the filing the present declaration, and is now pending, and open to all advantages on the side of the defendant; and the present plaintiff will have an opportunity of doing what he ought to have done, aside of filing this declaration, to wit, setting forth the contract, and pleading his account in fulfilment.

Plaintiff's counsel. The agreement set forth in the plea is not under seal, and can operate no further than a mere permission by the defendant, that the plaintiff should enter upon and continue in possession of his farm; but to make the case stronger, grant that the contract had been under seal, yet it is laid down in the books, "that if a man by obligation acknowledges that he has received money *ad proficiendum*

et compu anedum, the obligee may either sue for the bond, or have an action of account at his election." *Bacon's Abridgment*, vol. 1. p. 36. And by parity of reasoning, the obligor may in such case plead the fulfilment of the covenants, or have an action of account.

In the present case, the plaintiff had yielded in repairs a greater sum than the amount of the rent, and we have inquired in what mode he should have recovered the surplus, if he had relied upon the contract, and given this account in fulfilment. It is replied, that some charges in our account are anterior to the lease, and might have been reserved for a separate action. It will be noted, that the contract bears date the 9th of *June*, 1796, and that it recognises a lease commencing the 1st of *April* preceding, and the first item in our account is charged on the 15th of *March* still preceding; so that a great part of our account is anterior to the contract.

If the defendant intended to rely on the contract, he should have declared upon it in the *suit pending*, in lieu of which he has declared upon the promissory note without proferting any written agreement in which the note was included. Therefore if we have mistaken our remedy by filing this declaration, the defendant, when plaintiff, led us into the mistake by stepping aside from the written agreement himself, and declaring simply upon the promissory note; and "no man shall take benefit of his own wrong."

But we rest securely on the fair construction of the statute, which enables every defendant, in an action upon bond, bill, note, or other contract, who shall have any demand on book against the plaintiff, to file his declaration, and in due course of law to obtain

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the liquidation of his account, in order to plead it in offset to the plaintiff's demand.

It is said this mode exposes the original plaintiff to costs. Whether he will be saddled with the costs arising under this declaration, is to be hereafter decided. If we cannot substantiate our account, the statute gives the original plaintiff 12 per cent. interest on the amount of his demand, and taxes us with double costs in the discretion of the Court as a recompense to him for the delay, and a mulct upon us for our false clamour. If, on the other hand, we obtain judgment upon our account, and upon the trial in offset it should appear that the plaintiff in the original suit is in arrear to us, he ought justly to be saddled with the costs arising under this declaration, for his indiscretion in instituting a suit upon a promissory note, which had been more than paid.

Judgment: Plea in bar insufficient, and that defendant do account. Auditors appointed.

Robinson, *Fay*, and *Israel Smith*, for plaintiff.
Langdon and *Darius Chipman*, for defendant.

JOSHUA WARNER, Assignee of the Sheriff, Appellant,
against
DANIEL EVENS and BENJAMIN GARDNER.

To an action for an escape brought by the sheriff's assignee upon a bail-bond executed to the sheriff as chief keeper of the gaol by a prisoner committed on mesne process under the 10th section of the act relating to gaols and gaolers, it is no sufficient bar, after an escape, to set forth, that the prisoner remained within the sheriff's bailiwick, and was at all times amenable to the writ of execution, which issued upon the original judgment.

ACTION upon a bail-bond for the liberties of the prison, taken on a commitment upon *mesne process.*

The plaintiff demands in debt, 800 dollars, which the defendants justly owe, and unjustly detain.

Declaring in substance, that on the 11th of *December*, 1797, he prayed out his writ of attachment against the defendant *Evens*, returnable to *Orange* County Court, *June* term, A. D. 1798, and directed to the sheriff of *Bennington* County, or either constable of *Pownal*, in said County. That *Erastus Jewett*, constable of *Pownal*, served the writ on the 21st day of *December*, 1797, by arresting the body of *Evens*, and committing him to *Bennington* County gaol. That *Evens*, being so in the custody of *David Robinson*, Esquire, sheriff of the County, was on the same day admitted by the sheriff to the liberties of the prison; and on that occasion, and to indemnify the sheriff, the defendants executed the bond declared upon.

That on the 28th of *December*, defendant *Evens* escaped, having never paid the debt demanded in the writ, or compromised the suit upon which he was committed, or been in any manner legally liberated or discharged from his imprisonment.

That at *June* term, 1798, *Orange* County, he the plaintiff recovered judgment against *Evens* on de-

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fault for 514 dollars damages, and 13 dols. 74 cts. costs. That he purchased out his writ of execution, and put it into the hands of a proper officer to serve and return, who in due time proceeded to said prison to levy said writ of execution upon the body of the said *Evens;* but he had escaped as aforesaid, and was not to be found in the custody of the sheriff, within said prison; whereby the sheriff became liable to pay and satisfy to the plaintiff the said judgment so by him recovered, and was thereby subjected to loss and damage.

That the bond being so forfeited, at his request, in pursuance of the statute, the sheriff, on the 15th *July*, 1798, assigned the same to the plaintiff for the recovery of the penal sum of which bond this action is brought, &c.

And now the defendants in Court, by their attorneys plead and say, that the plaintiff from having and maintaining his said action against them ought to be barred, because they say, that though true it is they made and executed said bond as set forth in the plaintiff's declaration, and the said *Daniel Evens* did go without the liberties of said prison, yet for plea in that behalf they say, that the said *Daniel Evens* was, at the time of the praying out of said writ by the said *Joshua*, and ever since hath been, an inhabitant of the town of *Pownal* aforesaid; and after the said judgment was rendered against him in favour of the said *Joshua* by *Orange* County Court aforesaid, and before the praying out of said writ, he the said *Joshua Warner* purchased out his writ of execution against the said *Daniel Evens*, on the judgment aforesaid, and repaired with the said writ of execution to the town of *Pownal* aforesaid, and to

the house of the said *Daniel Evens*, and the said *Daniel* then and there desired and requested the said *Joshua Warner* to charge and procure him the said *Daniel Evens* to be arrested on and charged with said writ of execution, and then and there declared, that he was then ready and willing to be charged with said writ of execution, the said writ of execution being then in full life; but the said *Joshua Warner* then and there did, and always has refused and omitted to charge the said *Daniel Evens* with the said writ of execution, although he the said *Daniel* has been always ready at his residence in *Pownal* aforesaid, to be charged therewith; by reason whereof the said defendants further say, that the said sheriff, or the said *Joshua Warner*, hath not been damnified, or liable to be damnified, by reason of the said *Daniel's* going without the liberties of the said prison; and this they are ready to verify, &c. wherefore the defendants pray judgment, &c.

To this plea, plaintiff demurred.

Chipman, for the plaintiff. Immediately upon the escape, a right of action accrued to the sheriff, who was answerable for the body.

This mode was instituted to answer in some measure for bail on mesne process, but the mode is different here. Upon the escape, the sheriff was liable and the bondsmen were liable. The sheriff was obliged to assign, and the plaintiff entitled to his action. How is this right purged away? Can it be done by alleging, that the debtor was within the bailiwick, and might have been charged within the life of the execution. This is no bar to, it is not even a suspension of the right.

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Upon the escape, the sheriff could not recommit. In *negligent* escapes the sheriff may make fresh suit, and recapture and recommit, but not in *voluntary* escapes.

The plaintiff had a right to levy his execution on person or property. If he had satisfied his execution it would have been conclusive against him, but he was not compellable to do either.

Here we contend only for a right. What sum we shall eventually recover will be the subject of assessment of damages.

Fay, e contra. The genius of our government abhors the unnecessary confinement of its citizens in prison. Therefore the Legislature have provided, that when a debtor is arrested on mesne process, he may procure some person as bail for his appearance to respond the final judgment, which may be rendered against him. The prisoner then goes at large. When the execution is taken out on the judgment against him, if his body can be taken in execution, or is to be found within the sheriff's bailiwick, the bail is exonerated. If a *non est* is returned by the officer upon the execution, a *scire facias* must be taken out against the bail, and he may avoid a judgment against himself by surrendering his principal into Court, and paying the costs to the time of such surrender. Such is the benign spirit of our laws.

But it seems a case might arise, where the debtor not procuring bail in time upon the arrest, is committed to close prison.

The Legislature meant to apply in their fullest extent the same benevolent provisions of the law to this case, and have enacted, " that any person imprisoned

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in gaol on *mesne* process, in any civil action, shall have the same privilege of the liberties of the prison, as in case he had been committed on execution."

Vermont Stat. vol. 1. p. 283. c. xxviii. s. 10. act relating to gaols and gaolers, &c. passed *March* 9, 1797.

What is the spirit and design of this act? Is it not in strict consonance with the provisions of the act in case of bail upon arrest upon mesne process? Is it not merely to secure the body of the debtor to appear in the life of the execution? Was it necessary to effect this, to require more of the surety in a bail-bond for the liberties of the prison, than was required of bail on the arrest? The bail on an arrest might permit his bailee to go free, and rely on his word to be forthcoming upon the issuing of the execution—shall not the bail for the liberties have the same right? both being equally and alone answerable, in the event of a *non est* or inability to surrender him in Court.

What injury has the plaintiff sustained? He attached the body to respond on a judgment he might recover. He purchased out his writ of execution, and he found the body arrested within the bailiwick, ready to be charged with it. Has he then been damnified by this escape?

That we have given a sound construction to the statute, is put beyond doubt by the explanatory act passed the last sessions of the General Assembly: "Whereas doubts have arisen on the construction of the 10th and 11th sections of the act relating to gaols and gaolers, &c. passed *March* 9, 1797, which to explain, it is enacted in substance, that such bail shall have the same privileges as bail signing on the back of an attachment without commitment."

Vermont Stat. vol. 1. p. 292. passed *Nov.* 6, 1801.

Nathaniel Chipman, in reply. The explanatory act does not go so far as to do away the right of action

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on the bond, but only provides, that the "bail shal have the same privilege of exonerating himself by delivering up the principal, as the bail signing on the back of the attachment, without commitment."

The question is not, whether *Gardner* the surety shall deliver up *Evens* the principal on payment of costs; but by the pleadings it is, whether the bond be forfeited or not.

Opinion of the Court.

The question submitted by the pleadings is simply whether the bond be forfeited or not. The defendants contend that it is not forfeited, because the defendant *Evens* was within the sheriff's bailiwick, and amenable to the writ of execution, which the plaintiff declined charging him with. This subject matter of the plea in bar does not meet the allegations of the declaration, nor does it exhibit a justification for the escape. If the Court should give the same construction to the 10th and 11th sections of the act relating to gaols and gaolers, and for the relief of persons imprisoned therein, as is given by the explanatory act of *November*, 1801, the bond would still be considered as forfeited by the escape; for under that act no advantage can be taken by the obligors in avoidance of the bond, in any other mode than that therein prescribed, to wit, by the surety's surrendering the principal in Court.

The plea in bar is therefore considered to be insufficient; but on the chancery of the bond a question may perhaps be made, whether the surety may

not then surrender his principal, upon payment of costs.*

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Nathaniel Chipman, for plaintiff.
David Fay, for defendant.

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* *Note.* At *Manchester February* term, 1803, in this County, the defendant *Gardner*, as surety, had, on motion, leave to surrender his principal *Evens* into Court upon payment of costs, and the Court chancered the penalty of the bond to one cent, and ordered *Daniel Evens* into the custody of the sheriff, to be kept fifteen days, that the plaintiff might charge him with the execution on his original judgment.

Vermont Stat. vol. 1. p. 68.

ROMEO WADSWORTH, Appellant,
against
BENJAMIN FASSETT, Esquire, late Guardian.

APPEAL from Probate Court.

Benjamin Fassett, Esquire, as late guardian to *Henry Walbridge* the second, since deceased, exhibited his account *as guardian*, against the estate of *Elisha Nichols*, deceased, to the Probate Court, on the 5th of *April*, 1802. The Judge examined and allowed the guardian's account, and ordered it to be recorded.

From this decree, *Wadsworth*, in behalf of his wife *Eunice*, daughter and heir of *Elisha Nichols*, deceased, appealed.

A question is now made, in what mode shall the appellant's objections to the guardian's account be made to the Court?

In all appeals from the Probate Court, this Court, as the Supreme Court of Probate, will proceed conformably to the practice in the Court, and not subject the appealed cause to the rules of pleading which regulate the common law proceedings of the Court.

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Per Curiam. The 78th section of the act for the probate of wills, and the settlement of testate and intestate estates, constitutes this Court the Supreme Court of Probate. In all appeals from the Probate, our proceedings must be so far conformable to the proceedings in that Court, as to carry the design of the probate system into the most beneficial effect. If, on appeals from decrees in the Probate Court, the appealed causes are to be subjected to the rules of pleading ordinarily practised in this Court, delays would be created every way repugnant to the speedy settlement of the estates of deceased persons.

Vermont Stat. vol. 1. p. 151. When an appeal is taken from a decree of the Judge of Probate, upon the allowance of a guardian's account, the Judge should cause the register of his Court to certify a copy of such account, and send it up with the copies to the Supreme Court, where objections may be taken to its allowance in the nature of a bill of exceptions, or exceptions to a report of auditors.

In the present case it appears, that the Judge of Probate has very correctly certified a copy of the guardian's account, which has been brought up in the copies from the registry of probate. Let the appellant file his objections to the account in the nature of a bill of exceptions, or exceptions to the report of auditors, and the Court will proceed to consider such objections.

Lott Hall, for appellant.
Fay and *Selden*, for appellee.

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EBENEZER HARRIS, Esquire, Reviewer,
against
AMOS HUNTINGTON, Junior, et al. Reviewees.

MOTION in arrest.

No action can be maintained for a libel upon a petition for redress of grievances, *whether the subject matter of the petition be true or false*, simply on its being preferred to either branch of the General Assembly, or disclosed to any of its members.

Attach *Amos Huntington* and *Jedediah Clark*, to answer unto *Ebenezer Harris*, Esquire, in a plea of trespass on the case, for that whereas the said *Ebenezer* is a true, honest, just, and faithful citizen of this and the *United States*, and as such hath always from his nativity hitherto behaved and governed himself, and also hath, for the term of six years last past, been, by the Legislature of the State of *Vermont*, duly appointed, commissioned, and sworn to the office of Justice of the Peace within and for the County of *Bennington*, and until the time of committing the injuries hereafter mentioned, and of the devising, writing, and publishing the false, scandalous, malicious, and defamatory libel, hereafter mentioned, by the defendants, of and concerning the said *Ebenezer*, was always reputed and esteemed and accepted, amongst all his neighbours, and other good and worthy citizens of this and the other *United States*, to be a person of good name, fame, credit, and reputation, and also to have always administered in his said office of Justice of the Peace, within his jurisdiction as aforesaid, with honesty, fairness and impartiality, always conducting therein as became a magistrate of the people, thereby acquiring large sums of money, to the comfortable support of himself and family, and to the great increase of his reputation and riches, to wit, at *Shaftsbury* aforesaid, yet

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the said defendants, well knowing the premises, but envying the happy state and condition of the said *Ebenezer*, and contriving and falsely and maliciously intending to hurt, prejudice, and injure the said *Ebenezer* in his good name, fame, credit, and reputation aforesaid, and to cause him to be esteemed and reputed to be a breaker of the peace, a quarrelling, fighting, and sabbath-breaking member of society, overreaching and taking undue advantages in obtaining the property of his neighbours, possessing a corrupt and wicked heart, and to prevent the Legislature of the State of *Vermont* from re-electing him the said *Ebenezer* to the office of Justice of the Peace as aforesaid, and to cause him the said *Ebenezer* to be criminally prosecuted for breaking the peace, breaking the sabbath, and for a public cheat, and to ruin him in his reputation and credit therein, did, on the 5th day of *October*, A. D. 1799, at *Shaftsbury* aforesaid, write and publish the following false, scandalous, malicious, and defamatory libel, to divers the good people of this and the *United States*, and to the representatives of the freemen of this State, when in their General Assembly met, to wit, at *Windsor*, in the County of *Windsor*, at their stated session in the month of *October* last past, in the words following, to wit:

To the Honourable the Legislature of the State of *Vermont*, to be convened at *Windsor* on the second *Thursday* of instant *October*,

The petition and remonstrance of us the subscribers, inhabitants of *Shaftsbury*, in which we humbly state the following facts relative to the conduct of

Ebenezer Harris, Esquire, Justice of the Peace in said *Shaftsbury*, to wit:

The said *Ebenezer*, instead of preserving the peace, is heinously a peace-breaker. He hath been guilty of quarrelling, threatening, and fighting on the sabbath and other days, all which we are ready to prove.

Further, we believe, from the deposition of *David Peck*, and corroborating circumstances, he has been guilty of overreaching and taking undue advantages in obtaining property of his neighbours. He does not possess that uprightness and integrity of heart and manners that becomes the man who is entrusted with the commission of the peace. This we firmly believe.

Therefore, confiding in the wisdom and uprightness of the Legislature, do solemnly protest against the reappointment of the said *Ebenezer*, and as in duty bound will ever pray.

Amos Huntington, junior.
Jedediah Clark.
Benjamin Corey.
Benjamin Corey, junior.
John Downer.

Shaftsbury, 5th of *October*, 1799.

By the means of the writing and publishing which said false, scandalous, malicious, infamous, and defamatory libel aforesaid, he the said *Ebenezer* is greatly hurt, prejudiced, and damnified, in his aforesaid good name, fame, credit, and reputation, and is brought into public scandal, ignominy, and disgrace, amongst all his neighbours, friends, and acquaintance, and those to whom the innocence and integrity of the

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said *Ebenezer* were unknown, have, from the time of publishing the said false, &c. libel, &c. &c. *ad damnum*, 5,000 dollars.

To this declaration the defendants pleaded the general issue, and gave notice that they should give the truth of the words *written* in justification. At the last term, the Jury returned a verdict for the plaintiff, one dollar damages, and the defendants moved the following rule:

The defendants, after verdict against them, and before judgment had and rendered thereon, by their attorneys, now here in Court, move for a rule on the plaintiff, to show cause, if any he have, why the verdict aforesaid should not be set aside, and no judgment rendered thereon.

First. For that the action aforesaid is brought upon a petition or memorial by the said *Amos* and *Jedediah*, and three other inhabitants of said *Shaftsbury*, praying, for certain reasons therein mentioned, that the plaintiff might not be reappointed a Justice of the Peace for said County of *Bennington*, and, from the evidence adduced in the trial of said cause, it appeared, that said petition was no otherwise published than by presenting the same to the Legislature when convened in convention for the nomination and appointment of Justices of the Peace and other officers of government, on which evidence the Jury found the defendants guilty of the publication of a malicious libel, which is against law.

Secondly. The Jury aforesaid, to wit, nine of them, consented to a verdict of one dollar damages only, upon the principle, that by law the plaintiff would be entitled to one dollar costs only.

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Thirdly. That the said *Amos* and *Jedediah* are joined together in the same action, whereas by law two or more persons cannot be joined together in an action of slander.

Fourthly. For that the plaintiff's declaration, and matters and things therein contained, in manner and form aforesaid, are insufficient in law to render any judgment thereon in favour of the plaintiff against the defendants, and this they are ready to verify, and thereof pray judgment, and for their costs.

Rule granted.

And now, at the present term, the plaintiff showed cause, and the case was argued and decided.*

TYLER, Assistant Judge, delivered the opinion of the Court, the Chief Judge having been of counsel for the plaintiff.

Opinion of the Court.

Curia. The plaintiff, after setting forth a good character in the usual form, declares in substance, that the defendants, with a design to injure him, and more especially to prevent his re-election to the office of a Justice of the Peace, did, on the 5th of *October*,

* As the arguments of the counsel in this cause were elaborate and copious, and may be collected from the opinion of the Court, and would occupy too many pages of this volume, to the exclusion of other cases, of which an immediate report is desirable, they are omitted. The gentlemen of the bar engaged will accept this apology for the omission of what would do them so much credit, and which is perhaps but feebly supplied by the statement of the Judge.....*Reporter.*

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1799, with others, write a false and defamatory libel, which the defendants published to divers of the good citizens of the State, and to the representatives of the freemen of the State, when convened in General Assembly at their stated sessions in that year. The alleged libel is set forth in the declaration *verbatim et literatim*, and in substance states,

That the petitioners are ready to prove, that the plaintiff, instead of preserving the peace, is heinously a peace-breaker, and had been guilty of quarrelling, threatening, and fighting, on the sabbath and other days.

That he did not possess that uprightness and integrity of heart or manners, which becomes a man in the commission of the peace.

And that they are led to conclude, from the deposition of one *Peck*, and other corroborating circumstances, that the plaintiff had been guilty of overreaching and taking undue advantages in obtaining property of his neighbours.

The defendants having pleaded the general issue, with notice that they should give the truth of the words written in justification, a verdict has been found for the plaintiff to recover one dollar damages. A rule has been moved for by the defendants, for the plaintiff to show cause why this verdict should not be set aside.

First. Because the only publication of the alleged libel shown in evidence to the Jury, was the presenting of it as a petition to the General Assembly.

Secondly. That certain of the panel who tried the cause were influenced in their assent to the verdict by improper motives.

Thirdly. That two defendants cannot be joined in the same declaration in an action for slander.

Fourthly. Because of the general insufficiency of the declaration.

The rule has been granted, and the several exceptions enforced and combatted by the counsel, in a manner which reflects credit upon their professional industry and ingenuity, and affords favourable auspices, that at a not far distant period the bar of *Vermont* will be viewed in a light not unfavourable by the more eminent of the profession in the elder States.

The first and third exceptions, which are included in the fourth, go to the right of action. The object of the second is merely to obtain a *venire de novo*.

The first involves a question of greater magnitude, and more interesting to the people of *Vermont* than any which has been hitherto agitated in this Court, to wit, whether it is actionable in the citizens to represent their grievances by petition to the General Assembly. Whether such petition, though it should contain false matter, be a libel in the legal acceptation of the term.

It is contended by the defendants it is not. That to petition the King or Parliament is not held to be libellous in *England*, and therefore by the common law, and more especially by that paramount law, our bill of rights, it cannot so be considered here.

The doctrine of libels is now well settled and lucidly explained by the *English* jurists.

" A libel is a false and malicious defamation of any person, made public by either writing or printing, signs or pictures, in order to provoke him to

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wrath, or to expose him to public hatred, contempt, or ridicule."

The law punishes the offender by indictment, and gives redress to the injured party by an action of defamation.

In the criminal prosecution, the truth or falsity of the libel is immaterial, for even the truth ought not to be thus promulgated, when its direct tendency is to incite revenge, perhaps occasion bloodshed, or at least disturb the public peace. But though the accused on indictment are inhibited from this apparently equitable and natural mode of defence, of showing the truth of the words published, yet in the civil action the law has indulged a very liberal defence. The defendant may not only show that the words written are true, but whether true or false, he may justify from the *occasion* of writing and publishing of them, and thus do away the malice which is essential in the definition of a libel, when prosecuted *civiliter*.

1 *Term Rep.* p. 110.

In the case of *Weatherston* against *Hawkin*, it is laid down, that a servant cannot maintain an action against his former master for a letter written by him in which he charges him with fraud, for *the master was justified by the occasion.*

This case does high honour to that legal discrimination for which the Judges of the *English* bench are so eminently distinguished.

The law, which gives an action for a written defamation, did not thereby intend to destroy the common confidential intercourse among friends, and which is the surest guard against imposition. A man may know many fraudulent acts in his hired servant, which he could not prove in defence to an action of defamation, but which he is under every moral and

honourable obligation to communicate, in order to prevent injury to others.

So the occasion will justify the writing in all matters in course of legal proceedings.

An action will not lie for slanderous words in an indictment. *Cro. Eliz.* 247. 3 *Leon* 138. 4 *Rep* 14.

In the case of *Astley*, Bart. v. *Younge*, Esquire, we have an action on the case for speaking and publishing defamatory, false, malicious, and libellous words. The second count in the declaration charges the defendant with having filed a libellous affidavit in the Court of King's Bench, in which he charged the plaintiff with having sworn falsely in a former affidavit. To this count the defendant justified, that he made such affidavit in his own defence in a Court of Justice. The plaintiff demurred generally, and the Court of King's Bench unanimously decided, that the action on this count would not lie. 2 *Burr. Rep.* p. 807.

Numerous other cases might be cited to show, that where the occasion renders the writing and publishing the words necessary, no action of defamation on such writing will lie.

But we proceed to a case more in point, though included in the principle stated—the celebrated case of *Lake* against *King*, decided 19 and 20 *Charles* the second, under the Presidency of Chief Justice *Hale*, assisted by *Twisden* and *Rainsford*, Justices. *Saund. Rep.* vol. 1. p. 131.

This was an action upon the case for *printing* and publishing a scandalous libel of the plaintiff *Lake* by the defendant *King*. The plaintiff set forth his integrity and good character, especially in those particulars in which he, in an official character, had been vilified, and then set forth the alleged libel, in this form, viz. To the honourable the committee of Par-

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liament for grievances, the humble petition of *Edward King*, &c. showeth; and in fact the libel charged the plaintiff with many horrible and gross abuses, such as extortion, oppression, vexation, and other misdemeanors in his office. The defendant pleaded in bar, that the matter contained in the petition was true, and showed how in some particulars; but rested his justification, that he had presented his petition to a committee appointed by the commons then and there assembled in Parliament, who had full power to hear and redress the grievances complained of; that he caused the petition to be printed, and delivered the same to the members of the committee. To this plea the plaintiff, as in the present case, demurred.

This case was oftentimes debated, and had the most deliberate investigation; for the Reporter informs us that it was depending twelve terms; and it was agreed, "that the exhibiting of the petition to the committee of parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine whether it be true or false."

It was, however, argued for the plaintiff, that it was not justifiable, that is, the *printing of the petition* was not justifiable, for it seems not to have been contended that the presenting it was unjustifiable; but it was insisted, that the printing and dispersing the petition was not justifiable, for if it were, then, under a pretence of proceeding in a course of justice, a libel might be *printed*, published, and dispersed, of any man throughout the whole kingdom, and yet he should have no remedy; and therefore it was said,

that although the exhibiting the said petition was lawful, yet the printing of it was a publication of it to all the world, which is not lawful to be done in any case; but the Court considered, that to print and deliver copies was in the order and course of proceedings in Parliament, whereof they ought to take judicial notice; so that the whole stress of the case lay upon the publishing in the mode set forth in the plea in bar, to wit, by delivering copies of the petition to the members of the committee of the House of Commons, and the Court rendered judgment for the defendant.

It will be observed, that this case is much stronger than the one *sub judice*. The defendants' petition found by the Jury to be a libel, was merely presented to the General Assembly. No copies were printed, taken, or dispersed; but the petition of the defendant *King* was printed, dispersed, and published, among divers subjects of our then lord the king, as alleged in the declaration; and it is acknowledged by this defendant in the plea in bar, that *copies* were delivered to divers subjects of the King, being members of the committee of commons.

The petition of the defendant *King* charges the plaintiff *Lake* with sundry gross misdemeanors in his official character, *positively*. In the libel declared upon, the petitioners present their charges against the plaintiff as allegations, which they expected to have occasion to prove. They do not charge the fraud in obtaining property of his neighbours by undue advantages, *positively;* but rest their belief of it upon the affidavit of *Peck*, and other corroborating circumstances.

An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from

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the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it.

And it would be equally destructive of the right, for the Courts of Law to support actions of defamation grounded on such petitions as libellous.

Petitions for redress of grievances will generally point to officers of the government, who have, or may be supposed to have abused its confidence by mal-administration; and although the government should refrain from prosecuting the petitioners criminally, yet it would operate as effectual a restraint upon them to expose them to an action for damages at the suit of those of whose conduct they have complained to government.

Indeed, if the privilege of petitioning is abused, it might seem better for government to cure the evil, than to suffer it to be corrected by individual suit, for the government can direct or restrain the prosecution, can temper the punishment with mercy, or absolve it by pardon, and *possibly* so conduct, that while they check the abuse, they do not destroy the right; but an irritated and interested individual may conceive it eligible to destroy the right of petitioning. The Court, therefore, consider an indictment or civil action for a libel contained in a petition to the supreme power for the redress of grievances, as standing on the same footing, and the whole to be included in the subject's right to petition.

Our *English* ancestors have ever held the privilege of petitioning the King and Parliament for redress of

grievances as an inherent right; and their Courts of Law have ever, excepting in a solitary instance, discountenanced prosecutions declarative of such petitions as libels.

It is observable, that the statute of the 13th of *Charles* the second, passed six years before the case last cited, though contemplating petitions of a particular nature, and though circumscribing the mode of petitioning, nevertheless recognises the subject's right to petition, and may be considered as in affirmance of that common law right.

But the next and succeeding reigns put the subject's right of petitioning upon an unshaken basis, not only by the verdict of a Jury in a municipal Court, but by the solemn decision of the nation expressed by the national convention, who secured this right, not merely by statute force, but in a declaration of those fundamental rights inherent in *Englishmen*, and which has since been ratified by successive parliaments. We allude to the case of the seven bishops, indicted for a libel in the last year of the reign of *James* the second, and the proceedings at the revolution in 1688.

This unfortunate monarch, who possessed many of those brilliant talents which so highly distinguished the *Stuart* race, had unhappily imbibed opinions of the royal prerogative, which were held by the nation totally incompatible with that portion of liberty which ought to be enjoyed in a limited monarchy.

In the year 1686, he issued a proclamation suspending all the penal laws in ecclesiastical affairs. In the year 1688, he renewed this proclamation, and ordered that it should be publicly read after divine service in all the churches by the national clergy.

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The primate of *England* and six suffragans petitioned his majesty to be excused from publishing the proclamation in their churches, in which they declared, that it was founded upon such a dispensing power in the crown as had often been declared illegal in parliament, and they could not in prudence, honour, or conscience, so far make themselves parties to it, as a distribution of it all over the nation, and the publication of it even in God's own house, in the time of divine service, must amount to in common and reasonable construction.

The bishops were prosecuted for a high misdemeanor in composing and uttering a seditious libel; and though the cause was tried by a Jury, and the abstract point of the right of petitioning was not brought before the Court by issue at bar; yet we learn, that the question was agitated, and the right of petitioning ably advocated by the counsel for the bishops, Sir *Robert Sawyer*, Sir *Francis Pemberton* *Pollexfen*, *Treby*, and *Somers*, afterwards the celebrated Lord *Somers;* names which are dear to the lovers of rational liberty, and venerable to the profession. The Jury, supported by the sentiments of *Powell*, Justice, and in opposition to the opinion of a majority of the bench, who wanted either integrity or firmness to support the national rights, acquitted the prisoners. Thus the right of petitioning was established by an *English* Jury. But the subject did not rest here. In the declaration of the Prince of *Orange*, preparatory to his descent into *England*, *James's* conduct in directing this prosecution is enumerated among the national grievances as "the treating of petitions even the most modest, and from persons of the highest rank, as *criminal and seditious*."

Hume's History of England, vol. 6. Vide *Hargrave's* edit. of the *State Trials*, vol. 4. p. 317.

And this is represented by historians to have been one of the principal errors which led to the abdication of that infatuated monarch.

Upon the abdication of King *James*, and the settlement of the crown in *William* and *Mary* and the protestant succession, which silenced the altercation of centuries upon *English* rights, the Conventional Parliament, in the bill of rights, declared, "that the subject hath a right to petition, and that all commitments and *prosecutions* for such petitioning are illegal."

1 *William and Mary*, stat. 2. cap. 2.

And we, as the descendants of *Englishmen*, when we formed our constitution of government, reduced to writing this invaluable privilege of the common law; and in the declaration of the rights of the inhabitants of the State of *Vermont*, it is declared, "that the people have a right to apply to the Legislature for redress of grievances, by address, petition, or remonstrance."

Declaration of Rights, *Vermont* Constitution, c. 1. art. xx.

And to give, if possible, a more solemn sanction to this political right with others, the 42d section of the second chapter of the constitution was inserted. "The declaration of the political rights and privileges of the inhabitants of this State, is hereby declared to be a part of the constitution of this commonwealth, and ought not to be violated *on any pretence* whatsoever."

Vermont Stat vol. 1. p. 45.

This declaration of the right, with the observations already made, might seem to decide the question litigated; but as the point is new, and has been argued with great but not unbecoming zeal on the part of the plaintiff, and appears to be a question of interest to the community at large, which it is desirable should be settled on such grounds as may put it for

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ever at rest, it may not be improper to investigate it further.

Several objections made by the plaintiff's counsel remain to be considered.

First. That although an action may not lie for a libel upon a petition presented to the house of representatives, the subject matter of which petition is properly cognisable by that body; yet that the charges in this petition are for crimes beyond their jurisdiction, and alone cognisable in the judicial Courts.

Secondly. That the Jury have found the whole declaration true by a general verdict, and the declaration alleges the petition to be a malicious libel, and such a libel is not covered by the twentieth article of the declaration of rights.

That the declaration alleges a publication other than that made to the house of representatives, to wit, "to divers the good citizens of this and the other *United States.*"

Thirdly. That the doctrine, that libellous petitions may be preferred with impunity, and without redress to the persons libelled, is of dangerous consequence to society; that in this mode the best characters may be traduced, and the most malicious scandals be widely disseminated, with impunity to the defamer, and without redress to the injured.

The Court have given these objections their due weight upon the first. It is to be observed, that though it is true the house of representatives have no power to try persons for crimes, yet it does not follow that they may not examine into the conduct of officers of government, to discover whether they are qualified for re-election, or may not have committed

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acts which may subject them to impeachment. The constitution gives the power to the house of representatives to redress grievances, and to impeach state criminals. The Governor and Council, with the consultory aid of the Judges of this Court, are constituted a board to try impeachments; and the house of representatives are thus made the grand inquest of the State to charge such state criminals.

Constitution of *Vermont*, c. 2. s. ix. and xi.

As to the second objection, the Court consider, that though the Jury, by their general verdict, have found the allegations in the declaration, yet that the declaration itself does not set forth any malice, excepting what grows out of the fact of presenting the petition to the representatives of the freemen, in their General Assembly met: and this malice is merged in the right of the citizen to petition for redress of grievances.

Neither does the declaration allege any other publication than by presenting the petition in the mode just mentioned. The expression "to divers of the good people of this and the *United States*," is explained in the declaration to be such citizens as were members of the house of representatives, who were both citizens of this and the *United States*, and such publication appeared in evidence, and is spread upon the record in the rule.

The third objection appears to be the same in substance as that advanced by the plaintiff's counsel in the case of *Lake* v. *King*, and which did not prevail with the Court of King's Bench.

The Court would here observe, that the venerable body to whom petitions of this nature are addressed, though they cannot punish the petitioners, possess an ample power to correct an improper use of this right,

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as this Court, though possessing no power to prevent a party's giving notice of facts to be shown under the general issue, or to punish him for so doing, have put a complete check to an illiberal practice of traducing the character of the adverse party in such notices, which, in compliance with the suggestions of their clients, some of the junior practitioners have been induced to do.

But if this right of petitioning for a redress of grievances should sometimes be perverted to the purposes of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare.

The Court, therefore, consider, that no action can be maintained for a libel, upon a petition for redress of grievances, whether the subject matter of the petition be true or false, simply on its being preferred to either branch of the General Assembly, or disclosed to any of its members.

Though they would here suggest, that it is possible that an action might lie on such petition, if, with a malicious design to injure and defame, it were published in the public newspapers without the order of the General Assembly, as such publication would not be necessary to the occasion, nor would be within the course of proceedings in our Parliament; but in such case it might be doubtful, whether an action in the present form would lie, or whether an action on the case, in the nature of a writ of conspiracy, should not be preferred.

The Court, by the rejection of the testimony of *John Henry* and *Jonathan Wentworth*, Jurors of the panel who tried the issue, offered in support of the second exception in the rule, have superseded the necessity of any further remark on this point, other than that the oftener it is argued, they are more confirmed in the correctness of former decisions, that the affidavits of any of the panel cannot, on motion to set aside a verdict, be read to disclose the deliberations of the Jury-room.

The affidavits of any of the panel cannot, on motion to set aside a verdict, be read to disclose the deliberations of the Jury-room. Vide *ante*, p. 1 *Windover and Hopkins* v. *Robbins*.

The Court consider the third exception in the rule, that this action cannot lie as against two coupled in the same declaration, as not well taken.

In the case of *The King* against *Benfield and Saunders*, it appears, that an indictment for a libel against two will well lie if it be for an entire offence, *a joint act done by both*. And we have not had cited, neither do we recollect any decision that an action on the case for a libel will not lie, where it is, as in the present case, a joint act done by both defendants. But it is unnecessary to enlarge upon this point, as a favourable decision here cannot benefit the plaintiff. Neither shall we notice the fourth exception, as every object aimed at by the rule has been obtained by the defendants under the decision upon the first.

2 *Burr. Rep.* p. 985.

An action on the case for a libel will lie against two or more, if it be a joint act done by all.

Let judgment be entered, that the rule be made absolute as of record, and that the defendants have their costs.

Nathaniel Chipman, *Jonathan Robinson*, and *David Fay*, for plaintiff.

Israel Smith, *Lott Hall*, and *Chauncey Langdon*, for defendants.

Olin
v.
Chipman.

GIDEON OLIN, Esquire,
against
NATHANIEL CHIPMAN, Esquire.

(Reserved Case.)

Opinion of the Court on the reserved case, *Olin v. Chipman*, argued *June* adjourned term, *Bennington* County, A. D. 1801, as reported in the first volume, p. 167.

ACTION on the case for a libel.

At this term this cause was reargued, there being a new bench; but as the arguments of the counsel did not materially vary from those addressed to the former Judges as reported, p. 167. of the first volume, they are omitted.

Opinion of the Court.

The plaintiff has declared in case upon a libel alleged to have been written and published by the defendant, "*of the meaning and purport following, to wit.*" In support of the declaration, the plaintiff offered to read in evidence to the Jury *The Green Mountain Patriot*, a paper printed in *Peachum*, said to contain the libel. An exception was taken by the defendant to its being read, as it varied from the libel declared upon in the following particulars:

First. In the declaration the libel was headed "Electioncering Communication;" the word "electioneering," it appearing in evidence, being inserted by the printers to notify their readers of the subject matter of the piece.

Secondly. That the declaration alleged the libel to contain the following words, *the* national government; but the paper adduced contained the words, *our* national government.

Thirdly. That the declaration contained *try coloured* in two words, in lieu of *tricoloured* in the paper.

On exception being taken by the counsel for the defendant for these variances, it was ordered by the Court, that the trial should proceed, and the paper produced be read in evidence to the Jury, and that the verdict which might be found should be subjected to the opinion of the Court, first, whether the said variances, or any of them, are fatal in point of law against the plaintiff; that is, if they are of such importance as would, by judgment of Court, have precluded the libel in the newspaper from being read in evidence.

Secondly. If such variances, or any of them, are fatal, would the Court have permitted the plaintiff so to have amended his declaration as would have suited the mode of declaring to the evidence.

Upon the first point, the Court are of opinion, that the definite article, in *the* words, confines the plaintiff to the precise words; and what follows, to wit, "*of the meaning and purport following*," must be considered as the sense the plaintiff chooses to annex to these words; but omitting the article "*the*," and reading, "in words of the meaning and import following, to wit," would place it upon the substance. This distinction may seem nice, but is certainly well supported by the authorities cited.

Upon inspection of the whole declaration it appears, that the plaintiff, by the insertion of various *innuendoes*, illustrative of his conception of the sense and meaning of the defendant's expression in the libel, formerly conceived that he had recited the precise words of the libel; for if he had understood that

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he had declared only on the sense and substance of the words, it would have been unnecessary, by the introduction of *innuendoes*, to explain what an allowable circuity or change of expression, under the latitude of a declaration on the substance, would have rendered explicit without them. The Court, therefore, consider the declaration to be upon the precise words. It remains to be considered, whether the variances between the declaration and the paper offered in evidence, are of such importance as would, by judgment of the Court, have precluded the latter from being read in evidence on the trial.

In a declaration *in hæc verba*, the plaintiff must recite the precise words of the libel. The term "electioneering," as it merely headed the piece, and tended rather to devest the libel of its malicious force, as it indicated, its publication on an occasion when the truth is not to be expected, and leasing is held venial in political ethics, might have been considered as no material variance, and the inserting in the declaration "*try coloured*" for "*triooloured*," might seem rather to partake of that over nicety which is repelled by the maxim, *qui hæret in literâ hæret in cortice*. But the inserting of *our* in the designation of a general government, in lieu of *the*, which conveys a different, and certainly more illiberal meaning, when taken into connection with the libellous context, is a material variance. The action for slander, where the libel has been declared upon *in hæc verba*, has often been defeated for variances less material. If the reserved case had rested on this point, judgment must have been for the defendant.

But upon the second point, whether the Court would have permitted such variances to have been

amended: the Court, when they consider our statute of jeofails, peruse the *English* authorities, and call to mind the practice of this Court ever since the passing this beneficial act, and more especially the recent decision of the Court in the case of *Harris* v. *Lawrence et al.* decided at the same term in which this case was reserved, cannot retain a doubt that these defects are amendable. In this case, the Court ought especially to extend the purview of the statute liberally to the plaintiff. The grand and weightiest objection to an amendment of a declaration, consists in the surprise it may occasion to the defendant. Here it will be recollected, that on a former occasion exception had been taken to these variances by the defendant. The plaintiff had moved for leave to amend, and had amended on payment of costs. His intention to amend from the precise words to the substance, is obvious; for he has ever insisted, that he had effected this in all his arguments. It appears, however, that he has misconceived the effect of his amendment. His declaration still confines him to the precise words. But assuredly, after this intention in the plaintiff to amend from the precise words to the substance, and his persisting that he had so amended, the defendant cannot complain of any surprise.

Vide *ante*, vol. 1. p. 156.

Let the verdict be recorded as accepted by the Court, and judgment entered for the plaintiff accordingly.

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EZRA BRACKETT
against
The STATE of VERMONT.

Before the act defining the duties of Grand Jurors, passed *October* 27th, 1801, a town grand juror could not prefer a complaint under his official oath for the breach of any law excepting the sabbath act, or for the apprehension of the persons and tools of counterfeiters.

IN ERROR. This writ was brought to reverse a judgment of *Bennington* County Court, rendered *Manchester June* term, 1801. The writ was entered at the *July* adjourned term of this Court the same year; at which term, upon *oyer* of the record craved and read, and diminution alleged, the Court, on motion of the Attorney for the State, issued the following writ of *certiorari* to the Clerk of that Court.

Form of a writ of *certiorari* directed to the clerk of a County Court, to certify the record in case of error and diminution alleged, with the form of the clerk's return thereon.

STATE of VERMONT. *Supreme Court of Judicature, Bennington County, Manchester July adjourned term, A. D.* 1801.

To *Nathaniel Brush*, Esquire, Clerk of the County Court, within and for the County of *Bennington*, greeting:

Forasmuch as in the records and process, as also in the judgment of said County Court, at their last term holden at *Manchester*, within and for said County, on the first *Monday* of *June*, A. D. 1801, against *Ezra Brackett*, of said *Manchester*, on a certain information against him the said *Ezra Brackett*, for feloniously taking, stealing, and carrying away from the shop of one *Seth Allen*, in *Dorset*, in said County, three bars of iron, of about one hundred weight, of the value of seven dollars, and of the property of one *John Cook*, of said *Dorset*, against law, and especially one certain statute law of this State, entitled, an act for the punishment of theft, whereof the said *Ezra*

Brackett is impeached thereupon by a Jury of the County, and convicted by judgment of the Court; wherein it is said manifest error hath intervened to the grievous damage of the said *Ezra Brackett*, as by his complaint here in Court we are informed: We, willing that the said errors, if any there be, should be duly amended, and full and speedy justice to the said *Ezra Brackett* be done in the premises, do command you to send us, distinctly and plainly, under the seal of said Court, true and attested copies of the information, record, and judgment thereon, with all things touching the same, with this writ, and your return thereon made, so that we may have them at the next term of our said Court, to be holden at *Bennington*, within and for the County of *Bennington*, on the third *Tuesday* next following the fourth *Tuesday* of *January* next ensuing, that by inspecting the records and process aforesaid, we may cause further to be done thereupon for amending the said errors, as of right, and according to the laws of the land, shall seem to us meet to be done. Granted and allowed at *Manchester*, in open Court, this 6th day of *July*, *Anno Domini* one thousand eight hundred and one.*

By order of Court,

Attest,

Samuel Robinson, 2d Clerk.

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* As there are no books of entries appropriated peculiarly to our practice, I have inserted the above writ at large, with the return, for the benefit of the clerks of the several Courts, and others who may have occasion to draft it. It appears to have been copied *mutatis mutandis* from *Rastal's Entries*, vide p. 289. under the head of Error. "*Br. de error sur jug. br.*

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STATE of VERMONT. *Bennington County. Clerk's Office.*

(L. S.)

To the Honourable the Justices of the Supreme Court of Judicature, now sitting at *Bennington*, within and for the County of *Bennington.*

In obedience to the within writ, I herewith send up, under my hand and the seal of the County Court of said County, true and attested copies of all the proceedings of said County Court, in the case of the *State of Vermont* against *Ezra Brackett*, with all matters and things touching the information and judgment had and rendered thereon in said County Court.

Nathaniel Brush, Clerk.

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d'entre." Perhaps, however, it would have been better to have substituted the more appropriate writ in the same author, p. 290. "*Brief de certiorari sur diminution allege.*" To which excellent compiler, in this infant state of our juridical practice, the gentlemen of the *Vermont* bar are respectfully referred.

Let not the young student be *terrified* by the black letter and frequent abbreviation, or the classical scholar be *disgusted* with the awkward idiom of the *Norman French*, or the bald style of the Monkish Latinity; for they may rest assured, that he who studies *Rastal's Entries* with attention will acquire knowledge profitable for use through his whole professional life. Remember the advice of the immortal *Littleton* to his son, in his third book of tenures, in the chapter of confirmation. "Et saches, mon fits, que un des pluis honorables et laudables et profitables choses in nostre ley, est daver le science de bien pleder en actions realx et personelx, et per ceo jeo toy *counsaile especialment* de metter ton COURAGE et cure de ce apprendre."....*Reporter.*

Vide *Rastal's* Preface.

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To *John Shumway*, Esquire, Justice of the Peace within and for the County of *Bennington*, comes *Asa Baldwin* the 2d, one of the Grand Jurors for the town of *Dorset*, and on his oath of office complains and gives said Justice to understand, that *Ezra Brackett*, of *Manchester*, in said County, did, on or about the 20th day of *September*, A. D. 1800, feloniously take, steal, and carry away, from the shop of *Seth Allen*, junior, in *Dorset*, in said County, three bars of iron, of about one hundred pounds weight, the property of *John Cook*, of said *Dorset*, well worth seven dollars; all which taking, stealing, and carrying away is against law, and especially a statute law of this State, entitled, an act for the punishment of theft, and against the peace and dignity of the State of *Vermont*. Your complainant further prays process.

Dorset, *March* 13, A. D. 1801.

Asa Baldwin, Grand Juror.

Bennington County, ss.

Dorset, *March* 13, A. D. 1801.

Then received the above complaint into my office.

John Shumway, Just. Pacis.

To the Sheriff of the County of *Bennington*, his deputy, or either of the constables of *Manchester*, in said County, greeting:

By the authority of the State of *Vermont*.

You are hereby commanded forthwith to apprehend the body of *Ezra Brackett*, of *Manchester* aforesaid, and him have and cause to appear before me or *some other proper authority*, to answer unto the above complaint, and to be further dealt with ac-

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cording to law. Given under my hand at *Dorset*, in the County of *Bennington*, this 13th day of *March*, 1801.

Manchester, March 14, A. D. 1801. Then served the within warrant by apprehending the body of the within named *Ezra Brackett*, and have him here in Court, ready for trial.

Stephen Martindale, Constable.

Mr. Justice Sexton's Record.

The Court opened the 14th day of *March*, A. D. 1801. The complaint was read, and the prisoner put to plead, who pleaded not guilty, and put himself on a Jury of his country for trial. A Jury was legally summoned and sworn; and after hearing the evidence, as well for the State as the prisoner, and what was said against him as well as what was said in his defence, the Jury brought in a verdict that the said *Ezra Brackett* was guilty. The Court highly approved of the verdict, and thought it was just, and sentenced the prisoner to pay a fine of seven dollars into the town treasury of the town of *Dorset*, and all legal costs of prosecution, and to stand committed until sentence be complied with. The prisoner in Court moved for an appeal, which is granted him, to the County Court next to be holden in this County in *Manchester*, and entered into a bond of recognisance in the sum of 300 dollars, with sureties to prosecute his appeal to effect, and pay all intervening damages if he failed to make his plea good.

Attest, *George Sexton*, Justice of the Peace.

The bill of costs taxed against the delinquent is ten dollars and nine cents.

Attest, *George Sexton*, Justice of the Peace.

Bennington County, ss. *Manchester*, *March* the 23d, 1801. The above and within is a true copy of the original complaint and writ, with the proceedings thereon, given from my office, all except the bill of costs.

Attest, *George Sexton*, Justice of the Peace.

State of Vermont. Bennington, ss.
County Court, *Manchester June* Term, A. D. 1801.

State of Vermont, Appellee,
v.
Ezra Brackett, Appellant.

On complaint of theft, the delinquent being cited to plead to the foregoing complaint, pleaded not guilty, and put himself on the country for trial; and a Jury, to wit, *Moses Robinson*, &c. good men and true, &c. were impanelled and sworn, who returned a verdict that the said *Ezra Brackett* is guilty.

And now the said *Ezra Brackett*, here in Court, in his own proper person, moves the Court that the verdict of the Jury, in the cause of the State of *Vermont* against him, may be set aside and held for nought, and that no judgment may be rendered against him in said cause. Because he says, that the said *Asa Baldwin* the 2d, Grand Juror as aforesaid, who made out and exhibited the said complaint and information, was not authorized by law to exhibit the same.

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Also the crime mentioned in said complaint and information, is therein set forth to be against law, and more especially against a certain law of this State, entitled, an act for the punishment of theft. Also that the said *Ezra Brackett* is not charged to have committed said offence *vi et armis*. Wherefore he prays judgment, &c.

The Court, after hearing, &c. the arguments of the counsel for the culprit on the motion for setting aside the verdict, and arresting the judgment in this cause, do consider, that the matters and things in said motion contained are insufficient in law to set aside the said verdict, and to arrest the judgment thereon to be rendered, and that the culprit take nothing by his said motion. Whereupon it is considered by the Court, that the said *Ezra Brackett*, in consideration of the offence whereof he stands here convicted by verdict of his country, do pay a fine of seven dollars to the treasurer of the town of *Dorset*, with costs of prosecution taxed at thirty-three dollars and twenty-five cents, and stand committed until sentence be complied with.

The foregoing is a true copy from the records and proceedings of the County Court holden at *Manchester*, within and for the County of *Bennington*, on the first *Monday* of *June*, A. D. 1801, in the cause of the *State of Vermont*, appellee, v. *Ezra Brackett*, appellant. In testimony whereof, I, *Nathaniel Brush*, Clerk of said Court, have hereunto set my hand, and affixed the seal of said Court.

Nathaniel Brush.

In nullo est erratum pleaded and joined.

The errors assigned, with the arguments of counsel, may be collected from the opinion of the Court.

TYLER, Assistant Judge, delivered the opinion of the Court, the Chief Judge being absent, occasioned by sickness.

Curia. The errors assigned are,

First. That there is no sufficient information exhibited against the now plaintiff in error, whereon to ground any judgment against him.

Secondly. That the said information or complaint was exhibited by one *Asa Baldwin* the 2d, as Grand Juror of the town of *Dorset*, who was not authorized by law, as town Grand Juror, to exhibit the same.

Thirdly. That the offence charged in the information is not alleged to be done *vi et armis*.

Fourthly. That the offence charged in the information or complaint is laid to be against law, and especially a statute law of this State, entitled, an act for the punishment of theft, there being no such act in force.

Then a general assignment of errors, under which the plaintiff in error sets down the following:

First. That the Justice's record does not set forth in what place the Justice's Court for the trial of the now plaintiff was holden.

Secondly. That *Dorset*, mentioned in the record, is not alleged to be within the Justice's jurisdiction.

Thirdly. The warrant issued by the subscribing authority directs the officer to bring the now plaintiff before him or some other proper authority.

The two first errors particularly assigned, resolve themselves into one question, to wit, whether *Asa*

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Baldwin the 2d, as a Grand Juror elected by the town of *Dorset*, had a right, in his capacity of town Grand Juror, to file an information under his official oath, for the breach of any law excepting in such cases as are especially provided for by statute, which, by examination of the statute, are found to be two; the one for the breach of the sabbath act, and the other for the apprehension of the persons and the tools of counterfeiters of coins or bank bills.

This question seems to have arisen from a *casus omissus* in the act regulating town meetings, and the choice and duty of town officers, passed *February* 28, 1797.

A recurrence to former and existing statutes may at the same time show how this happened, and elucidate the principles upon which the opinion of the Court is founded.

Hough & Spooner's edit. of the Statutes, p. 158. Ib. p. 81, 82.

The act for regulating town and other public meetings, and directing the choice of town officers, passed *February* 7th, 1787, provides, that it shall be the duty of the inhabitants, when convened at their annual *March* meeting, to proceed to choose, among other town officers, "*one or more Grand Jurors.*"

On the 27th of *February*, 1787, the General Assembly passed an act "for summoning Juries, and directing Grand Jurors in their duty;" and by the 7th section enacted, "that all Grand Jurors shall diligently inquire after, and due presentment make of all misdemeanors and breaches of law whereof they have cognisance, whether the same were committed before said Grand Jurors were chosen and sworn to said office, or afterwards, which presentment they shall seasonably make to the Court, or some Justice

of the Peace, that the offenders may be dealt with according to law."

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The practice under these acts was for the clerks of the Supreme and County Courts to issue *venires*, summoning these Grand Jurors, thus elected by the towns in the several Counties to appear at Court, where, when impanelled, charged, and sworn, they constituted the Grand Jury attending at such Court as they were summoned, as had been provided in the first section of this act: that when such clerks shall be certified by the State Attorney of the County where such Court is to set, that a Grand Jury will be necessary, they shall also issue their precepts, directed as aforesaid, for summoning *so many of the Grand Jurors elected by the several towns* in such County, as to such clerks shall appear necessary, not exceeding twenty-four, nor less than thirteen, to appear on the first day of the sitting of said Court, *to serve as Grand Jurors at said Court.* It was, however, apprehended, that many of these town elected Grand Jurors, continued long in office by repeated re-election, had become accessible to delinquents. Therefore the General Assembly, on the 27th of *January*, 1791, passed an addition to this act; and by the second section enacted, "that whenever the *Attorney General** shall think it necessary for the Grand

Harwell's edit. State Stat. p. 271, 272.

* From the organization of the government to the year 1790, the prosecutions on behalf of the State, both in the Supreme and County Courts, had been managed by State Attorneys, appointed by the respective County Courts in each County. *October* 28, 1790, the General Assembly passed an act, appointing an Attorney General, and regulating his office and duty; whose duty it was to prosecute all matters and causes properly

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Jury to attend the Supreme Court, it shall be his duty to notify the same to the Clerk of said Court, a sufficient time before the sitting of the same, who shall issue his *venire*, directed as aforesaid, requiring him to summon as many able freeholders as are mentioned in said *venire*, from the different towns therein mentioned, not exceeding twenty-four, nor less than thirteen, to attend on said Court, on the first day of the sitting of the same, at ten o'clock in the forenoon. *And in order that said Jury shall be impartially summoned*, it shall be the duty of the sheriff or his deputy, who shall receive said *venire*, to repair to the respective clerks of the towns out of which the Jury is directed to be summoned, and the town clerk, with the advice of one or more Justices of the Peace within said County, shall agree upon three times the number of able freeholders in said town, and out

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cognisable by the Supreme Court on behalf of the State. *Haswell's* edit. *Vermont* Stat. p. 257. This office continued in existence until *October* 19th, 1795, when the Legislature repealed this act, and so much of the act of *March* 8, 1787, which empowered the County Court to appoint State Attorneys in each County; and provided, by an act of that date, "that there should be appointed annually by the Legislature, at their *October* session, in the same manner as other County officers are elected, one State Attorney, within and for the several Counties in this State, who shall be duly sworn, &c. whose duty it shall be to prosecute all matters and causes within their respective Counties, which are properly cognisable by the Supreme and several County Courts, on behalf of this State, &c. The substance of which act, on the revision of the statutes in 1797, was embodied into the act appointing State Attorneys, and Clerks of the Supreme Court in the several Counties in this State, and regulating their office and duty, passed *November* 10th, 1797, and now in force.....*Reporter*.

Vermont Stat. vol. 2. p. 53.

of that number shall draw by lot the number required for Grand Jurors, who shall be summoned as aforesaid." On the revision of the statutes in 1797, this act was repealed, and the existing statutes passed. The 59th section of the present judiciary act enacts, " that it shall be the duty of the clerk of the Supreme Court of Judicature in each County, some time previous to every stated session of said Court, to issue a *venire* directed to the sheriff of the County, or his deputy, and seasonably to deliver or cause the same to be delivered to such sheriff or deputy, commanding him to summon eighteen judicious men, being freeholders within said County, from the several towns in said County therein mentioned, to appear before said Court at ten o'clock, on the first day of the session of said Court, to serve as Grand Jurors in said Court; which Jurors shall be drawn in the same manner, and summoned within the same times, and a return thereof made in the same manner as is directed in the preceding section, which, treating of Petit Jurors, provides, " that such sheriff or his deputy shall repair to the town clerk's office in every such town, and in his presence, or, in case he shall be absent, in the presence of one or more of the selectmen of such town, *draw out of the box* containing the names of the persons nominated by the authority of such town to serve as —— Jurors, the number his *venire* directs him to summon." The mode of nominating and electing such persons whose names shall be put into the Jury-box is provided for by the 5th section of the act regulating town meetings, and the choice and duty of town officers; which enacts, " and the selectmen, constable or constables, town clerk, and such magistrates of the town

Vermont Stat. vol. 1. p. 78, 79.

Ib. p. 409.

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who may be present, shall agree upon such number of judicious and discreet freeholders to serve as Grand Jurors and Petit Jurors, as they shall judge will be the proportion of said town to attend the Supreme Court of Judicature and County Courts the year ensuing, which number shall be nominated by said authority, and chosen by the inhabitants present; and it is hereby made the duty of the town clerks to write the names of the persons so chosen on separate pieces of paper, and put them into different boxes, to be kept in his office, provided at the expense of the town for that purpose."

By the 3d section of the same act, it is made the duty of the inhabitants of the several towns to choose "*one or more Grand Jurors*," without expressly declaring them to be merely town officers, or defining their powers. These town officers having been habituated to enter complaints under their official oaths in all cases under the repealed regimen, have, in many instances, continued the practice since the revision of the statutes; and hence arose the mode of bringing the present information or complaint, which is excepted to as erroneous.

The State Attorney does not show any existing statute giving to town Grand Jurors the power to prefer an information or complaint for the crime alleged at the time of the preferring the complaint in question, but relies upon the act passed the last session of the General Assembly, defining the duties of Grand Jurors, who may be appointed agreeably to law in the several towns in this State for preserving and keeping the peace, which in its preamble recites, that "whereas the duties of Grand Jurors appointed by law in the several towns in this State for preserv-

Vermont Stat. vol. 1. p. 424. passed *Oct.* 27, 1801.

ing and keeping the peace *are not clearly defined or pointed out by law*, which to remedy, it is enacted, &c. that it shall be the duty of the Grand Jurors of the several towns in this State, who are or shall be hereafter appointed and duly qualified to keep the peace agreeably to law, to inquire into and due presentment make to proper authority, of all offences which may come to their knowledge within their respective towns against the laws and peace of this State, which they in their conscience shall think the design of the law and the good of the community require.

It is said that this act is explanatory and declarative; that the Legislature considered that the town Grand Jurors had the power contended for under the former statutes. Conceding this to be the case, the Court are of opinion, that no citizen ought to be prosecuted criminally under existing statutes, which are so obscurely made as that they cannot be readily comprehended; that if the town Grand Juror of *Dorset* had the power contended for, by the pre-existing statutes, which it is manifest he had not, the Legislature, in the preamble to the last recited act, have declared that it was *obscurely given*, "that it was not clearly defined or pointed out by law." In criminal prosecutions, where doubts arise in the construction of statutes, which cannot be solved but by Legislative wisdom and power, such doubts, until they are solved, should always operate in the judicial Courts in favour of innocence.

As the powers of these town Grand Jurors were not, before the passing of the act of *October*, 1801, defined by the pre-existing statutes, and inquiry has been made, whether the Grand Juror's office existed by common law, and what were the powers incident

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to it, in recurring to the books, we find their origin of ancient date. They are spoken of as early as the reign of *William* the Conqueror, and perhaps are coeval with the institution of hundreds under the *Saxons;* for every hundred was obliged to send two or more Grand Jurors to the Leet Court. But whilst we can attribute their origin to common law, perhaps almost all their principal powers, at least such as they exercise in modern times, are derived from successive statutes, in which they are incidentally mentioned as common informers. In this government we must look to our statute laws for the power of these town Grand Jurors, they being especially creatures of the statutes; and as the statutes existing before that passed the last session of the General Assembly had not empowered the town Grand Jurors to prefer complaints or informations on their official oaths, therefore the preferring the complaint against the plaintiff in error by *Baldwin*, the town Grand Juror of *Dorset*, must be considered erroneous.

The Court consider there is no error as assigned in the third exception, to wit, that the offence charged in the information is not alleged to have been done *vi et armis*.

At common law these words were considered to be necessary in indictments for offences, which amount to an actual disturbance of the peace. *Bacon's Abridgment*, vol. 3. p. 564.

It is not necessary to insert the words *vi et armis*, where they may be fairly implied from other words in a complaint, information, or indictment.

But this Court have ever adopted the distinction known in the *English* practice, under the statute 37th *Henry* VIII. cap. 8. that it is not necessary to insert these words where they may be fairly implied from other words in the complaint, information or indictment. The words *vi et armis* are implied in an indict-

ment for a riot in the words *riotose ceperunt, fregerunt, et prostraverunt. Rex* v. *Wind*, 2 *Stra.* 834. The words *vi et armis* are implied in various expressions and words in this complaint. The word *feloniously* in itself sufficiently implies them.

The fourth error assigned, to wit, that the statute is misrecited, might prevail, if it were not for the preceding expression in the complaint "*against law*," which must always be considered as against the common law of the land; the setting forth the title of a statute not *in esse* must in this case be considered as mere surplusage: but if the complaint should be considered to be laid *contra formam statuti*, the position cited from *Hawk. P. C.* vol. 2. p. 356. that where a crime is laid *contra formam statuti*, yet if it is a crime at common law the indictment may be maintained, has ever been recognised by this Court.

The first exception under the general assignment of errors, that the Justice does not set forth the place where his Court was holden, would be alone fatal. The magistrate should have shown upon his record the place where he held his Court; for it is essential to his official powers, that it be held within the extent of his commission of the peace.

In a criminal prosecution before a Justice of the Peace, his record must show the place where his Court is holden.

The next assignment of error, that *Dorset* is not set forth to be within the Justice's jurisdiction, cannot prevail, as it is cured by reference to other parts of the record.

Upon the last error assigned, "that the warrant issued by the subscribing authority directs the officer to apprehend and bring the now plaintiff before him *or some other proper authority*," the Court are not advised. The statute expressly prohibits the

Vermont Stat. vol. 1. p. 178. s. 25.

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Justices of the Peace, in civil causes, from issuing any writ returnable before any other magistrate than themselves, whilst the common practice has been for Justices to issue their warrants to apprehend delinquents returnable before themselves or some other proper authority. It has been usual in *England* for warrants to issue in this form. The Court, however, do not recollect any decision as to its correctness. As the practice has so long prevailed, and there is no existing law against it, perhaps it may be considered as bottomed on our common law; for if erroneous in the outset, it is now so generally practised, that *communis error facit jus.*

A question has been made, whether *Brackett*, the plaintiff, has not waived any exceptions to the proceedings before the magistrates, by his appeal to the County Court; and as the declaration in error prays the reversal of the judgment rendered by the County Court only, whether this has not restricted the inspection of this Court to the proceedings of the County Court; and reliance is had upon the 7th section of the act defining the powers of Justices of the Peace within this State, which enacts, "that no judgment, sentence, or decree, had or rendered by any Justice of the Peace within this State, on the merits of any civil cause or action within the jurisdiction of a Justice, shall be removed by a writ of error, *certiorari*, or any other process whatever, or shall be re-examined or reversed by the Supreme Court of Judicature, any law, usage, or custom, to the contrary notwithstanding." The citizen is allowed two trials in prosecutions for lesser crimes by the statute law; one before a single magistrate, and the other by appeal to the County Court, and both ought to be legal

Vermont Stat. vol. 1. p. 171.

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trials. Besides, the delinquent has been tried before the County Court, upon the same complaint or information, with all its imperfections, upon which he was tried before the single magistrate; and it will be observed, that the statute last cited restricts a writ of error only in civil causes, and a writ of error will lie to this Court upon a Justice's judgment in a criminal prosecution; and it is happy for the citizens of this State, that whilst the Legislature, by this statute, have, with paternal care, checked a spirit of petty litigation in civil matters, they have wisely, in criminal prosecutions, preserved the reputation of their fellow-citizens from being sacrificed by the errors of the more uninformed in the law.

A writ of error will lie upon a Justice's judgment rendered on a criminal prosecution.

Let judgment be entered, that the Court, having inspected the record, do find there is error therein, and that the judgment of the County Court be reversed.

Judgment reversed.

Serenus Swift and —— ——, for plaintiff.

Richard Skinner, State Attorney, and *David Fay*, for the State.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

WINDHAM COUNTY, AUGUST TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

JOSHUA HYDE, Appellant,
against
DAVID LEAVITT, Administrator of GRIFFIN, Appellee.

When a party against whom an action is brought, dies before the essoin day, the plaintiff cannot, by docketing his action on the return of a *scire facias*, compel the administrator to appear and defend the suit under the 73d section of the judiciary act, even if the right of action survives.

THE plaintiff had brought an action against *Griffin*, and declared in general *indebitatus assumpsit*. The writ was made returnable to *Windham* County Court, *June* term, 1801, and service commenced by

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attaching *Griffin's* property on the 31st of *December*, 1800, and completed by leaving an attested copy of the process with him, on the 26th of *May*, 1801. *Griffin* deceased on the 7th of *June* following, being the day before the essoin day. On the 8th of *June*, being the first day of the term, the plaintiff entered his action, *Joshua Hyde* v. *John Griffin*, and suggested *Griffin's* death on the record. The cause was continued to the next term of the County Court. In the interim the plaintiff purchased out his writ of *scire facias* against *Leavitt*, to show cause why he should not become a party to the suit, as administrator to the intestate. On the return of the *sci. fa.* *Leavitt* appeared, and pleaded in abatement. The County Court rendered judgment for the administrator, and the cause came by appeal to this Court. At this term the plea was argued and decided.

The whole matter in dispute rested on the true construction of the 73d section of the judiciary act,

Vermont Stat. vol. 1. c. vi. s. 73. p. 82, 83.

"That when any suit shall be *pending* in any Court of Record in this State, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action to final judgment, and the defendant or defendants shall be holden to answer thereto accordingly; and the Court before whom such cause may be pending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require; and if such executor or administrator, having been duly served with a *scire facias* from the clerk of the Court where

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such suit is pending, twelve days before the session of the Court to which such writ is returnable, shall neglect or refuse to become a party to the suit, the Court may render a judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. But if there be no executor or executors, administrator or administrators, elected or appointed, such action or suit, on suggestion of such death as aforesaid, shall be continued of course, until an executor or executors, administrator or administrators, shall be elected or appointed agreeably to law; and the executor or administrator, who shall become a party as aforesaid, shall, upon motion to the Court where the suit is pending, be entitled to a continuance of the same until the next term of the said Court. And if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

And the question is, was the action of *Hyde* v. *Griffin* ever pending in the County Court; for if it were, the administrator of the intestate might well be cited by the *sci. fa.* to become a party to it.

The counsel for the plaintiff argued, that this suit was there *pending*.

First. That the very definition of an action as given in *Coke on Littleton*, implies its pendency from the time of its institution. "*Actio nihil aliud est*

Co. Litt. 285.

quam jus prosequendi in judicio quod sibi debetur." When is the *jus prosequendi* put into operation by the plaintiff? for until that time it is a mere right, but at the service of the writ. The adverse party is then created defendant, and invested with all his rights. If the plaintiff fail to appear and prosecute as defendant, he may enter for costs: but whence his right to enter, if no suit had ever been *pending?*

That the common law expression, *pendente lite*, always included the action from its commencement, and is not applied exclusively to the suit after the return of the *præcipe*, and docketing the action by the Clerk of the Court.

That in the case of *Comb*, Esquire, v. *Pitt*, the question was, whether another action in the same term could be pleaded in bar to a popular action. To have availed in bar, it must have been an action pending prior to the commencement of the popular action. In the whole course of the arguments of the learned counsel, as well as in the opinion of the Court, these actions were considered to have been pending from the commencement of the several suits; and the priority of either the action of debt or the *latitat*, was the point mooted. *Burrow's Reports*, vol. 3. p. 1423.

So in the case of *Jackson* v. *Gesling*, *Strange's Reports*, 1169.

So the County Court considered by suffering the action against *Griffin* to remain upon their docket.

Secondly. The act explains itself sufficiently in the latter part of the section read; "and if there be two or more plaintiffs or defendants, and one or more of them dies, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving

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defendant or defendants, the *writ* or *action* shall not be thereby abated," &c. that here is a distinction made between the *writ* and the *action*, and it was inserted in the statute to save causes which had already been commenced, and where a party had died before the essoin day.

Thirdly. That no sufficient reason can be shown why the action upon the decease of a party should not survive after its commencement by service of the writ, as well as after its being entered on the Clerk's docket.

For the defendant it was insisted, that however a cause might be said to be pending at common law, from the commencement of the suit by the service of the writ, yet the expression of the statute qualifies the general intent of actions or suits pending. The administrator cannot be brought into Court as a party in all suits, but only in such as " shall be pending *in any Court of Record*," and this is further manifest from the next clause, and " either of the parties shall die," *not before the suit is entered*, but " before final judgment," and further, by the provision that the death of the party shall be suggested on *the record*; for there can be no record whilst the suit has proceeded no farther than mesne process. A continuance in a certain case is directed, which implies an action in Court.

That the expression " *writ or action*" does not make the distinction contended for, these terms being used synonymously, and not in opposition, and the latter part of the section is still contemplating actions or suits described in the former part. That the expression " when any suit shall be pending in any

Court of Record in this State, and either of the parties shall die before final judgment, &c. in case the cause of action doth by law survive," is the keystone of the section, and all which follows is dependent upon it.

That the action of *Hyde* v. *Griffin* died with the latter at common law, and could not be resuscitated but by statute, which it appears not to be; and no reason need be given why the Legislature have not willed to revive suits which were merely commenced by service of the writ, and not entered in Court until after the decease of a party.

Opinion of the Court.

The Chief Judge delivered the opinion of the Court.

The Court had ever considered this section of the statute as too explicit to admit of doubt, misconstruction, or controversy. The object of the statute is to save the useless expenditure of costs. Actions might frequently be brought, be zealously litigated, and great costs accrue to the injury of a party, and the encumbrance of the Court records, which actions might abate by common law on the death of a party. If the cause of action survived, such action might be recommenced for or against the legal representatives of the deceased, but the former costs would be lost, and the former proceedings become a dead letter; to remedy which this section, embodied with the judiciary act at the revision of the statutes in 1797, but formerly in force as a section of the act "empowering executors and administrators to prosecute and defend suits where one of the parties die pending the suit," was enacted.

Passed *Nov.* 1, 1791. *Haws* edit. of the Statutes, p. 275.

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It is now contended, that upon the decease of a person, all actions which have been commenced against him by the service of the writ in his life-time, though they should not be entered in Court until after his decease, are included in this 73d section of the judiciary act; and that consequently the legal representatives of the deceased may by *scire facias* be brought in to appear and made party to such suits.

The Court are decidedly of opinion, that neither the spirit or the letter of the 73d section of the judiciary act reach cases where a party dies before the action is entered in Court.*

Judgment for the defendant.

Jedediah Stark, for plaintiff.

Samuel Knight and *Daniel Farrand*, for defendant.

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* At their *October* sessions, A. D. 1804, the General Assembly passed an act, by the 2d section of which they enacted, "that when any suit shall be commenced, and either of the parties shall die before the same is entered in Court, there shall be the same right for or against executors or administrators, of entering and prosecuting the same, as by law now exists for the prosecuting a suit which is *pending* in Court at the time of the death of either of the parties. *Vermont* Statutes, vol. 1. p. 104.

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STATE *against* JOHN CAMPBELL, Esquire.

An indictment cannot be maintained against a Justice of the Peace for maladministration.

INDICTMENT against one who had been a Justice of the Peace for a misdemeanor in renewing a writ of execution after his commission had expired, and entering official fees for such renewal on the same.

The indictment states in substance, that *Campbell* was, by the General Assembly at the *Windsor* sessions, *October*, 1799, legally elected to the office of a Justice of the Peace, within and for the County of *Windham*, and duly commissioned by his excellency the Governor, to hold and exercise said office for the term of one year, to commence and be computed from the first day of *December* then next following the said election, until the same should be fully completed and ended. That he accepted the office, and was duly qualified by taking the necessary oaths.

That during said term, to wit, on the 6th of *June*, 1800, *Samuel Chandler* and *Levi Bigelow*, merchants, trading in company, by the consideration of said Justice of the Peace, recovered judgment against one *Amos Holebrook*, for the sum of 23 dols. 31 cts. damages, and 2 dols. 46 cts. costs. That on the same day the plaintiffs took out their writ of execution, which remained in their hands unsatisfied until the 16th of *December*, 1800, when *Campbell's* commission of Justice of the Peace had expired. That he, with a fraudulent intent to vex, harass, and oppress, &c. and under the colour of his assumed office, *vi et armis* endorsed upon the execution the

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following renewal of the writ, and antedated the same, entering his fees thereon.

Nov. 29, 1800.

The within writ of execution renewed to run sixty days from the date; all officers to whom directed to take notice, and govern themselves accordingly.

John Campbell, Just. Pacis.

Fees, 25 cts.

Which said fraudulent, vexatious, oppressive, antedated renewal of the same writ of execution, and the said *John Campbell's* commanding and directing the sheriff of the County of *Windham*, his deputy, or either constable of *Townshend*, to govern themselves according to the direction in the same fraudulent antedated renewal of the same execution made as aforesaid, and charging as pretended legal fees, and signing his the said *John Campbell's* name as a Justice of the Peace as aforesaid, to the same fraudulent antedated renewal of the same execution as aforesaid, manifestly tends to bring the constitution, laws, and lawful authority of the State of *Vermont* into utter contempt, is to the great injury, loss, vexation and oppression of the said *Amos Holebrook*, is contrary to law, and against the peace and dignity of the State.

To this indictment the defendant demurred.

In support of the demurrer, it was said, that on the expiration of his commission, a Justice of the Peace is not *functus officio* as to all the duties incident to his office. That by the 22d section of the act defining the powers of Justices of the Peace

Vermont Stat. vol. 1. c. ix. p. 177.

within this State, he is empowered, after removal from office, to give attested copies of his records. That the distinction between such powers as cease with and such as survive the commission, is between such official acts in the magistrate as are *judicial* and such as are merely *ministerial;* as in the case cited from the statute, to certify copies of his record being simply a ministerial act; and the renewal of a writ of execution is not a judicial act, as it does not affect the judgment.

But the principal reliance of the defendant was, that no indictment for mal-administration could be maintained against a Justice of the Peace; but the trial of such mal-administration must be by impeachment before the Governor and Council, as directed in the 24th section of the second chapter of the constitution.

In support of the indictment it was urged, That the intent of the act of *February* 22d, 1797, "limiting the time of holding the County offices therein mentioned," in directing that all such officers should hold and exercise their offices respectively for one year from the first day of *December* next following their election is manifest. It was to afford time to the Justices of the Peace to receive information, whether re-elected to office or not; that if not they might not be led inadvertently to do any official act after the expiration of their several commissions.

Vermont Stat. vol. 2. c. lxviii p. 52.

That the 22d section of the act "defining the powers of Justices of the Peace within this State," makes provision for the case stated in the indictment, to wit, where a Justice of the Peace should be removed from office before a writ of execution issued

Vermont Stat. vol. 1. p. 177.

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upon a judgment rendered during his political life, should be satisfied:

"That when any judgment shall have been rendered by any Justice of the Peace on confession or otherwise, and such Justice shall die or be *removed* from office before execution shall have issued thereon, the party recovering such judgment shall have a writ of *scire facias* returnable to the County Court to be holden in the same County in which such judgment was rendered, or to a Justice of the Peace of the same County, if within his cognisance; and on the return of *scire feci* on such writ, the plaintiff producing to the Court to which such writ is made returnable, a record of the original judgment, or an attested copy of the same, signed by the Justice so removed, or by the clerk of the County Court with whom the same may be lodged, shall recover judgment for such sum as shall appear to be unpaid, with the interest and additional costs, and execution may issue accordingly. That the 24th section of the 2d chapter of the constitution, expressly excepts "*prosecutions at law.*" "Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly, either when in office, or after his resignation or removal for mal-administration. All impeachments shall be before the Governor and Council, who shall hear and determine the same, and may award costs; *and no trial or impeachment shall be a bar to a prosecution at law.*"

It was replied by the demurrant's counsel,

That the 22d section of the act defining the powers of Justices, &c. only contemplated cases where judgment had been rendered by a Justice of the Peace,

and the Justice had died or been removed from office *before any execution had been issued thereon*, and therefore did not include the case in question.

And that the last clause in the 24th section of the second chapter of the constitution, applied only to civil prosecutions.

Opinion of the Court.

Curia, after stating the case. It is difficult to discover how the practice of renewing writs of execution by endorsement in the mode set forth in the indictment, was introduced. No statute in force is in favour of the practice, and no repealed act within the recollection of the Court ever authorized it.

A Justice of the Peace, in all cases where the life of the execution expires, and the date of the judgment will allow a new writ, should be careful that the original execution is returned into his office with a suitable return thereon, made by a proper officer, if it has been committed to an officer to serve, which return will contain a regular *non est;* or that, by direction of the plaintiff, he has omitted to make service, or as the case may be; or if it expired in the hands of the party, a minute indicative of the fact should be made on the writ, and noted on the Justice's record; and on the original executions being thus returned, he should issue an *alias* execution, or *pluries*, as the case may require. The Court make this remark for the benefit of the Justices of the Peace, and to correct a very loose practice, which is productive of many evils detri-

The practice of renewing writs of execution by endorsement by Justices of the Peace, is not well founded. A Justice of the Peace, in all cases where the life of an execution expires, and the date of the judgment will allow a new writ, should be careful that the original execution is returned into his office, with a suitable return thereon made by a proper officer, which return will contain a regular *non est*, or that by direction of the plaintiff he has omitted to make service, or as the case may be, or if it expired in the hands of the party, a minute indicative of the fact should be made on the writ, and noted on the Justice's record, and on the original executions being thus returned, he should issue an *alias* execution, or *pluries*, as the case may require.

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mental to the correct dispensation of justice, and incompatible with our judicial system.

The Court are of opinion, that the 22d section of the act defining the powers of Justices of the Peace, &c. includes not only cases where a judgment has been rendered, and no execution has issued at the time of the expiration of the Justice's commission, but comprises all cases where the Justice's commission ceases by his death or removal from office, after the issuing of any execution.

That upon the expiration of the commission of a Justice of the Peace, he cannot do any judicial or ministerial act, as such, unless the power is given to him expressly by statute. That he cannot justify the renewal, or, what would be more correct, the issuing an *alias* or *pluries* execution upon a judgment rendered by him during his political life.

If an injury is sustained in consequence of the mal-administration of a Justice of the Peace, an action against him will well lie.

That if an injury is sustained in consequence of it, an action against him will well lie; and he is also subjected in this case, as well as in every other instance of mal-administration, not to a trial upon indictment in the Judicial Courts, but by impeachment before the Governor and Council. In cases of mal-administration there is a peculiar and manifest propriety in thus leaving the injured citizen to seek his redress in the Courts of Law, and bringing State criminals, as they are styled in the constitution, to trial before this high national tribunal, where the solemnity and publicity of the trial will either publicly purge their official characters from imputed crime, or make their mal-administration known to the citizens at large, and especially to those in whom rests commonly the election to office.

The final clause in the 24th section of the second chapter of the constitution, does not militate against this construction of the constitution and the law; for when it is said, "no trial or impeachment shall be a bar to a prosecution at law," *civil prosecutions* are alone intended.

The Court therefore consider, that an indictment cannot be maintained against a Justice of the Peace for mal-administration, and therefore the indictment must be quashed.*

Farrand, State Attorney.
Stephen R. Bradley and *Lott Hall*, for defendant.

* *Sed quære.* Can a person be subjected to impeachment for mal-administration in his office on an act done after his commission had expired?.....*Reporter.*

JONATHAN HOUGHTON, Appellant,
against
THOMAS JEWETT and MATHEW MARTIN.

Departure in pleading.

DEPARTURE in pleading.

The plaintiff declared in debt on a bond. The defendant craved *oyer*. The penal part read is in the common form.

CONDITION.

"The condition of the above obligation is such, that if the above-named *Thomas Jewett* and *Mathew Martin* shall present *Joshua Wilder*, of *Wardsborough*

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aforesaid, yeoman, to the next Supreme Judicial Court, to be holden at *Northampton*, in the County of *Hampshire* and Commonwealth of *Massachusetts*, then and there to answer unto a recognisance, or pay the sum of two hundred dollars, and the cost which has or may arise therefrom, then this obligation to be void and of no effect, otherwise to remain in full force and virtue."

Which being read and heard, the said *Thomas* and *Mathew* come, &c. and for plea in this behalf say, that the plaintiff from having and maintaining his action against them, ought to be barred. Because they say, that in and by the said condition then read, it appears, that the said writing obligatory was not made by the said *Thomas* and *Mathew* for a true and just debt due to the said *Jonathan*, but was executed to the said *Jonathan* in the nature of a recognisance, to compel the said *Thomas* and *Mathew* to present, meaning to surrender the body of the said *Joshua Wilder* to the then next Supreme Judicial Court to be holden at *Northampton*, in the County of *Hampshire*, and Commonwealth of *Massachusetts*, or pay the sum of two hundred dollars and all costs. That by the law of the land no person in his individual capacity ought or can have a right to take bonds, writings obligatory, or recognisances, to compel any person whatsoever to surrender or present himself before any Court to answer recognisances, or pay the sum of two hundred dollars and the costs; and forasmuch as it appears, from the condition of said writing obligatory, that the same was made and taken against law and right, and to compel the said *Thomas* and *Mathew* to do that which the law would not warrant them to do, and that the same is contra-

dictory and uncertain. All which, &c. Wherefore they pray judgment, and for their costs.

REPLICATION.

And now the plaintiff, in reply to the defendants' plea in bar, pleads and says, that by the defendants' plea in bar, and any matters therein contained, from further having and maintaining his action aforesaid, he ought not to be barred. Because he saith, that though true it is that no person in his individual capacity ought or can have a right to take bonds or writings obligatory, or recognisances to compel any person whatsoever to surrender or present himself before any Court to answer recognisances, or pay the sum of two hundred dollars and costs, yet that the bond exhibited in *oyer* to the defendants, was not taken, executed, or delivered by the defendants to the plaintiff for any such unlawful purposes; but in truth and in fact, a long time before the execution and delivery of the aforesaid bond, to wit, on the 5th day of *October*, in the year of our Lord 1795, the plaintiff appeared before *Ebenezer Mattoon*, junior, and *Elisha Root*, Esquires, two of the Justices of the Peace within and for the County of *Hampshire*, and Commonwealth of *Massachusetts*, and acknowledged himself indebted to said Commonwealth in the sum of two hundred dollars, to be levied on his goods or chattels, lands or tenements, and in want thereof, on his body, to the use of the said Commonwealth, if *Joshua Wilder*, of *Wardsborough*, in the State of *Vermont*, being the same *Joshua Wilder* mentioned and intended in the aforesaid bond, did not personally appear before the Justices of the Supreme Judicial Court then next to be holden at

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Northampton, within and for the County of *Hampshire* aforesaid, on the last *Tuesday* of *April* then next, to answer to all such matters and things as should be then objected against the said *Joshua*, on behalf of the said Commonwealth, more especially for uttering counterfeited coin; and the plaintiff further saith, that having so recognised and bound himself for the personal appearance of the said *Wilder*, before the Court aforesaid, as bail to the said *Wilder* by the recognisance aforesaid, and having entered into the said recognisance at the special instance and request of the said *Wilder*, he had at all times good right and lawful authority to arrest the body of the said *Wilder*, and hold the same in his custody, so that he might compel him to make his personal appearance at the said Supreme Judicial Court to save his bail harmless from the penalty of the recognisance aforesaid; and the plaintiff further saith, that the said *Joshua Wilder*, having eloigned and escaped from the Commonwealth of *Massachusetts*, and fled into the north district of the town of *Wardsborough*, in the County of *Windham* and State of *Vermont*, the plaintiff, in his capacity of bail as aforesaid, on his recognisance aforesaid, did pursue and take the body of the said *Wilder*, on the 15th day of *February*, A. D. 1796, and so having lien upon the body of the said *Wilder*, that he should either go with him the plaintiff, and suffer himself to be delivered up to the said Supreme Judicial Court, according to the true intent and meaning of the said recognisance, or otherwise to obtain sufficient security to save the plaintiff harmless from the penalty of such recognisance, at the instigation of the said *Wilder*, the said *Mathew* and *Thomas*, on the same day, well knowing the pre-

mises, by their own voluntary act and deed made and executed the bond exhibited in *oyer* as aforesaid, as a counter security to save the plaintiff harmless from the penalty of the recognisance aforesaid, and was not executed to the plaintiff, as the defendants have averred in their plea in bar as aforesaid, in the nature of a recognisance to compel the said *Mathew* and *Thomas* to surrender or present the body of the said *Joshua Wilder* at the Supreme Court aforesaid, which counter security the plaintiff by the laws of the land was authorized to take and receive of the defendants. And the plaintiff further avers, that the said *Joshua Wilder* did not make his personal appearance before the said Supreme Judicial Court; and the plaintiff, relying on the bond aforesaid, did not bring the said *Wilder* into said Court, but that he the plaintiff, being thrice solemnly called in said Court to bring said *Joshua Wilder* into Court, for whom he was bail as aforesaid, and save himself harmless thereof, made default, by the reason of which the sum of two hundred dollars became forfeited and to be paid by the said *Jonathan* to the said Commonwealth. And the said *Jonathan* further saith, that a writ of *scire facias* was issued on behalf of the said Commonwealth on the 30th day of *December*, A. D. 1796, citing the said *Jonathan* to appear at the said Supreme Judicial Court holden at *Northampton*, in and for the County of *Hampshire* aforesaid, on the last *Tuesday* of *April*, A. D. 1797, and to show cause, if any he had, why he should not pay and render the said sum of two hundred dollars to the Commonwealth aforesaid, with additional costs; at which term of the said Supreme Judicial Court, the plaintiff, relying upon the bond aforesaid, did not deliver up said

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Wilder into Court, but thereof made default. And the plaintiff further saith, that the said action of *scire facias* being by order of said Supreme Judicial Court, continued to the then next term of said Court, holding at *Northampton*, within and for the County of *Hampshire* aforesaid, for the advice and consideration of said Court, in rendering up judgment in damages upon the default aforesaid in the action aforesaid, at said term of said Supreme Judicial Court, said Supreme Court did render judgment against the plaintiff in the sum of two hundred dollars damage, upon said default, and the further sum of ten dollars and eighty-four cents, costs of suit in said action of *scire facias*. And so the plaintiff saith, that by any thing in the defendants' plea above pleaded, the plaintiff ought not to be barred, because he says, as aforesaid, that the said bond exhibited in *oyer* was by the defendants knowingly and understandingly made and executed as a counter security to save the plaintiff harmless from the penalty of the recognisance as aforesaid, without that the said bond was made and executed to the said *Jonathan* in nature of a recognisance to compel the said *Thomas* and *Mathew* to present, meaning to surrender the body of the said *Joshua Wilder* to the then next Supreme Judicial Court as aforesaid, or to pay the sum of two hundred dollars and costs. All which records and proceedings of the said Supreme Judicial Court, and of the said Justices of the Peace, the plaintiff has here in Court ready to be produced, as the Court shall direct, and all which facts he is ready to verify. Wherefore he prays judgment of this Honourable Court, that by the defendants' plea in bar, and any thing therein contained, he ought not to be barred, and for his costs.

To this plea the defendants demurred specially, and took several exceptions; but that principally relied upon is,

Because the plaintiff's replication to the plea of the said *Mathew* and *Thomas* in bar contains matters and things foreign to the plaintiff's declaration, and is a manifest departure therefrom.

In support of the demurrer it was contended,

"That the replication must not vary from the declaration, but must pursue and maintain the cause of the plaintiff's action, otherwise it will be a departure in pleading, a going to another matter, a saying and unsaying, which the law will not allow." 1 *Inst.* 304.

That the plaintiff having declared only on the penal part of the bond, the condition read in *oyer* must be considered as part of the declaration.

That he has therefore in effect declared upon a bond executed by the defendants, conditioned that the defendants should present, meaning surrender, one *Joshua Wilder* to a Supreme Judicial Court, to answer to a recognisance, or pay two hundred dollars and costs.

The defendants have pleaded in bar, that such bond is illegal.

The plaintiff, confessing bonds of this nature to be illegal, replies in substance, that he himself had entered into a recognisance before two Justices of the Peace for the personal appearance of *Wilder* before the Judicial Court, in the sum of two hundred dollars. That *Wilder* escaped into this State. That he pursued him and had a lien upon his body. That the defendants voluntarily executed the bond, being conusant of the premises. That he, relying upon

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the bond, neglected to deliver *Wilder* in Court. That the recognisance has since been estreated, and additional costs taxed on *scire facias;* and therefore, that this is not a bond of recognisance, but a bond of indemnity.

The question therefore is, does this statement fortify the plaintiff's declaration? Does it not, in the language of the authority cited, unsay what the plaintiff had said in his declaration? The bond declared upon is a bond of recognisance. The bond insisted upon in the plea is a bond of indemnity.

As analogous cases, the defendants' counsel cited 2 Ld. *Raym. Rep.* p. 1449. *Walter White* v. *William Cleaver.* 1 *Saund.* 116. *Cutler* v. *Southern and others.* 2 *Saund.* p. 83. *Richards et al.* v. *Hodges.* Ib. p. 188. *Roberts* v. *Merrick.* 1 *Wils.* p. 122. *Harding* v. *Holmes.* Ib. p. 334. *Elliot* v. *Lane.* 2 *Wils.* p. 3. *Scott* v. *Dixon et al.* Ib. p. 96. *Palmer* v. *Stone and another.*

In support of the plea it was urged,

Bac. Abr. vol. 5. p. 449. Note under (L.) Departure in pleading.

"That where a man pleads any thing which he could not have shown at first, it shall never be reckoned a departure."

That the plaintiff had well declared upon the penal part of the bond, that he had shown the condition in *oyer.* That it was excepted in bar by the defendants, that the bond is illegal, and the reason why so set forth; and that the plaintiff had replied that it was not illegal, and shown wherein. That the whole point, whether the bond be illegal or not, turns upon the question, whether it was taken as a bond of recognisance or indemnity. That a traverse might have been taken, and an issue carved to the Jury,

which would have been a proper issue under the declaration as extended by the *oyer*. That the replication was therefore no departure from, but in fact fortified the declaration, showing that the plaintiff had a good cause of action, which had been negated by the plea in bar. That it did not gainsay the declaration, but merely combated the intent of the obligation declared upon, which had been obtruded upon it by the defendants' plea; and this was matter he could not have shown at first.

As illustrative, the plaintiff's counsel cited 1 Lord *Raym.* p. 120. *Serle* v. *Darford.* 2 *Wils.* p. 8. *Long* v. *Jackson.*

Judgment for defendants.*

Samuel Porter, for plaintiff.

Stephen R. Bradley and *Calvin Knowlton*, for defendants.

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* TYLER, Assistant Judge, did not sit in this cause, having been of counsel for the plaintiff.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

WINDSOR COUNTY, AUGUST TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

SELECTMEN of Windsor *against* STEPHEN JACOB, Esquire.

No inhabitant of this State can hold a slave, and though a bill of sale transferring a person as a slave may be valid by the *lex loci* of another State or dominion, yet when the master *becomes an inhabitant* of this State, his bill of sale ceases to operate here, and cannot be read in evidence to charge him with the maintenance of such person in sickness or the imbecility of old age.

THE plaintiffs, as selectmen and overseers of the poor of the town of *Windsor*, declared against the defendant in several counts of general *indebitatus assumpsit*.

First. For 100 dollars, money laid out and expended.

Secondly. For work and labour done. Both stated to be on the 1st day of *January*, 1801.

The plaintiffs in their specification stated, That on the 26th of *July*, 1783, the defendant purchased of one *White*, *Dinah*, a negro slave, whom he then brought into the town of *Windsor;* that she continued to live with and serve him as a slave until some time in the year 1800, when she became infirm, sick, and blind, and in this condition was discarded by the defendant, and became a public charge, and that for the moneys expended by the corporation for medicine and attendance during her sickness, and for her support since, this action is brought.

General issue pleaded, and joinder.

In support of the declaration, the plaintiffs offered to read in evidence to the Jury the bill of sale from *White* to the defendant.

Marsh, counsel for defendant, objected. If this action can be supported, it must be on the principle of the implied contract a master is under to maintain his slave. But we contend that no person can be held in slavery in this State; and the showing of a bill of sale can be no evidence that the unfortunate being supposed to be transferred by it as a human chattel, is a slave; for the contract in the bill of sale is void by our constitution, which, in the first article of the declaration of the rights of the inhabitants of the State of *Vermont*, declares, "That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, among which

Constitution. *Vermont* Stat. vol. 1. p. 30.

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are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety: Therefore no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, *slave*, or apprentice, after he arrives to the age of twenty-one years, nor *female* in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like."

It will not be contended that the *African Dinah* is within the exceptions to this fundamental right.

Hubbard, for the plaintiffs, replied,

That though no person can hold a slave *de jure* by our constitution, yet there may exist among us a slave *de facto*. That if a master will hold an *African* in bondage as a slave, contrary to right, and for a succession of years, during which the slave *de facto* spends the vigour of her life in his service, and in which she may be presumed to have earned for the master sufficient to maintain her in the decrepitude of old age, there is a moral obligation upon the master to support her when incapable of labour; and the law of common justice, upon which all equitable actions are founded, will imply a promise in him to respond any necessary expenses incurred by others for her support.

That it would operate extremely hard upon corporations, who possessed no power to loose the shackles of slavery while the slave continued in health, to be

made a common infirmary for them when sick and useless. Selectmen v. Jacob.

That the position, "that slavery cannot exist in this State," must be taken *cum grano salis;* for in case a slave-holder should pass through our territory attended by his slave, the constitution of the *United States* protects the master's tenure in the slave, in case the slave should abscond. "No person held to service or labour in one State under the laws thereof, escaping into another, shall, in consequence of any law, or regulation therein, be discharged from such service or labour, but shall be delivered up on the claim of the party to whom such service or labour may be due;" and by the act of the *United States* "respecting fugitives from justice, and persons escaping from the service of their masters," passed during the second session of the second Congress, the magistrates of this State are holden to aid in the arrest of fugitive slaves; and if they find, on examination, that the fugitive is a slave under the laws of the place from which he fled, they must certify the slavery; and the master or his agent may remove the fugitive *as such,* from this State, and annexing a penalty against all who may impede the slave-holder in seizing his property or rescuing the slave after he has been arrested. The bill of sale in ordinary cases must be admitted by the magistrates to substantiate the slave-holder's right. The principle upon which such bill is founded cannot be drawn into question, for that had been already settled by the article of the *United States* constitution cited. If, therefore, the bill of sale cannot be exhibited in evidence in this case, because it is void by our State constitution, it cannot be shown in any case; and this would avoid

Laws of the U. S. vol. 1. 17. art. 4. s. 2.

Ib. vol. 2. p. 166.

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Laws of the U. S. p. 18.

the constitution and laws of the *United States;* and, as if to meet the present case, the sixth article of the constitution of the *United States* declares, that this constitution, and the laws of the *United States* which shall be made in pursuance thereof, &c. shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the *constitution* and laws of any State to the contrary notwithstanding.

Marsh, contra. A distinction is attempted to be made between a slave holden *de jure* and a slave *de facto;* and it is urged, that in the latter case there exists a moral obligation in the master of such slave, who has received the benefit of her services, to bear the burthen of her infirmities. There is indeed a moral obligation upon all to be charitable, and to conduct conformably to the principles of natural justice, but we consider that such principles do not operate for, but against the plaintiffs. We beg liberty to state the facts, which, at the same time they do away an illiberal charge made against our client in the specification, will show, that no implied promise in the defendant can be raised in equity to respond moneys expended by the plaintiffs in support of the slave *de facto.*

Some time in the year 1783, the defendant brought the woman *Dinah* into this State. She continued in his family several years; and there can be but little doubt, from the excellent character and disposition of her master, she would have so continued until this time in sickness and in health; but several of the inhabitants of *Windsor*, represented in their corporate

capacity by the present plaintiffs, discovering that she was an excellent servant, and wishing to profit themselves of her labours, inveigled her from her master's family and service by the syren songs of *liberty and equality*, which have too often turned wiser heads. She spent the vigour of her life with these people, and wasted her strength in their service; and now she is blind, paralytic, and incapable of labour, they aim by this suit to compel the defendant *solely* to maintain her; for as a member of the corporation, on the event of the failure of this suit, he must bear his proportion of the burthen.

When she was enticed from the defendant's service, he did not attempt by legal aid to reclaim her. As an inhabitant of the State, in obedience to the constitution, he considered that he could not hold her as a slave. Is it equitable then, that when the sovereign power had dissolved the tenure by which he held her services, and when he had been deprived of her labours by the enticement of others, that by the same power, and *virtually* at the suit of the same people who enticed her from his service, and who have profited by her labours when in vigour and health, he should now be compelled to maintain her in the decrepitancy of old age.

It is said, that it is extremely hard for a corporation, who possessed no power to remove the slave *de facto* from her master whilst in health, to be compelled to support her when sick or infirm.

The corporation of *Windsor* should have availed itself of the provision of the act in this as in all other like cases, by warning her to depart the town, which is the only mode pointed out in the statutes to avert

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from a town corporation the expense of maintaining a pauper.*

It is said, that by the operation of the constitution and laws of the *United States*, slavery may be said to exist in this State in a qualified sense. We are not disposed to investigate this position. It is certainly more curious than important in its application to the case in question. In this case the right of a claimant to a fugitive slave is not in issue. The simple point is, is the defendant obligated to refund moneys advanced by others for medicine and attendance, and in support of a woman who had formerly been in his service? We contend that it cannot be upon any other principle than that she is his slave; which cannot be admitted under our constitution of government.

TYLER, Assistant Judge.† The plaintiffs, as selectmen, and overseers of the poor of the town of *Windsor*, have declared in two general counts, and have displayed their cause of action in their specification, and rest it upon the implied liability the de-

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* *Vide* An act in addition to an act, entitled, an act defining what shall be deemed and adjudged a legal settlement, and for the support of the poor, for designating the duties and powers of the overseers of the poor, and for the punishment of idle and disorderly persons, *Vermont* Stat. vol. 1. p. 400. c. xxxix. No. 2. passed *November* 6, 1801. The act to which this is an addition was passed *March* 3, 1797. Same volume, p. 382. A former act, "providing for and ordering transient, idle, impotent, and poor persons," was passed *March* 9, 1787. Vide *Haswell's* edit. *Vermont* Stat. p. 126. repealed 10th *November*, 1797. Vide *Vermont* Stat. vol. 2. p. 416. c. cxi. No. 2.

† JACOB, Assistant Judge, being a party, did not sit in this cause.

fendant is under to defray the expenses incurred by the sickness, and for the support of a blind aged person, who they allege is the defendant's slave, purchased by a regular bill of sale. In support of the declaration, this bill of sale is offered, and an exception is taken to its being read as evidence to the Jury. The question must turn upon the validity or operative force of this instrument *within this State.* If the bill of sale could by our constitution operate to bind the woman in slavery when brought by the defendant to inhabit within this State, then it ought to be admitted in evidence; and the law will raise a liability in the slave-holder to maintain her through all the vicissitudes of life; but if otherwise it is void.

Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here.

With respect to what has been observed upon the constitution and laws of the Union, I will observe, that whoever views attentively the constitution of the *United States,* while he admires the wisdom which framed it, will perceive, that in order to unite the interests of a numerous people inhabiting a broad extent of territory, and possessing from education and habits, different modes of thinking upon important subjects, it was necessary to make numerous provisions in favour of local prejudices, and so to construct the constitution, and so to enact the laws made under it, that the rights or the supposed rights of all should be secured throughout the whole national domain. In compliance with the spirit of this constitu-

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tion, upon our admission to the Federal Union, the statute laws of this State were revised, and a penal act,* which was supposed to militate against the third member of the 2d section of the 4th article of the constitution of the *United States*, was repealed; and if cases shall happen in which our local sentiments and feelings may be violated, yet I trust the good people of *Vermont* will on all such occasions submit with cheerfulness to the national constitution and laws, which, if we may in some particular wish more congenial to our modes of thinking, yet we must be sensible are productive of numerous and rich blessings to us as individuals, and to the State as an integral of the Union.

The question under consideration is not affected by the constitution or laws of the *United States*. It depends solely upon the construction of our own State constitution, as operative upon the inhabitants of the State; which, as it does not admit of the idea of slavery in any of its inhabitants, the contract which considers a person inhabiting the State territory as such, must be void. I am therefore against admitting the bill of sale in evidence.

Chief Judge. I concur fully in opinion with the Assistant Judge. I shall always respect the constitution and laws of the Union; and though it may sometimes be a reluctant, yet I shall always render a prompt obedience to them, fully sensible, that while

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* The act to prevent the sale and transportation of negroes and mulattoes out of this State, passed *October* 30, 1786. *Haswell's* edition of the Statutes, p. 117.

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I reverence a constitution and laws which favour the opinions and prejudices of the citizens of other sections of the Union, the same constitution and laws contain also provisions which favour our peculiar opinions and prejudices, and which may possibly be equally irreconcilable with the sentiments of the inhabitants of other States, as the very idea of slavery is to us. But when the question of slavery involves solely the interests of the inhabitants of this State, I shall cheerfully carry into effect the enlightened principles of our State constitution.

The bill of sale cannot be read in evidence to the Jury.

Plaintiffs nonsuited.

Jonathan Hatch Hubbard and *Amasa Paine*, for plaintiffs.

Charles Marsh and *Jacob Smith*, for defendant.

DANIEL DEWEY, Junior, Appellant,
against
JACOB BRADBURY and FRANCIS SHALLIS,
Appellees.

DEBT on two judgments.

When a creditor has taken out a writ of execution upon a judgment against two, one of whom has been committed upon it to prison, admitted to the liberties, and escaped, and the bail-bond has been assigned by the sheriff, and received by the creditor, he cannot maintain debt on such judgment against both.

The plaintiff declared in debt upon a judgment rendered in his favour against the defendants by the consideration of *William Perry*, Esquire, since deceased, on the fourth *Wednesday* of *June*, 1800, for

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the sum of 33 dols. 94 cts. damages, and 4 dols. 2 cts. costs of suit; which judgment he alleged to be in full force, and in no part satisfied.

The defendants pleaded in bar, confessing the judgment so to have been rendered, but that afterwards, to wit, on the 24th day of *June*, 1800, the plaintiff purchased out his writ of execution against them in due form of law to levy the several sums contained in the judgment with additional costs of the writ. That on the first day of *July* following, he delivered the same writ of execution to *Rice*, sheriff of *Windsor* County, to serve and return according to law. That on the 14th day of the same month, the writ of execution being in full force and life, the sheriff levied it by arresting the body of the defendant *Bradbury*, and committing him to the County gaol in *Woodstock*. That the sheriff, as chief keeper of the prison, on the 17th of the same *July*, admitted *Bradbury* to the liberties of the prison; and on that occasion, and as security to indemnify the sheriff against any escape the prisoner might make, the defendant *Bradbury*, with *Solomon Strong* and *Jedediah Strong*, made and executed to the sheriff, his heirs, executors, administrators, or *assigns*, a certain writing obligatory commonly called a gaol-bond, in the penal sum of 100 dollars, conditioned, that if the said *Bradbury*, then a prisoner in the gaol aforesaid, by virtue of the writ of execution aforesaid, for the sums therein contained, and also for the further sum of 1 dol. 44 cts. officers' fees for said commitment, should faithfully and absolutely remain within the liberties of said prison, and not depart therefrom until he should be lawfully discharged, without committing any escape, or doing any act by which the said

sheriff as aforesaid should be damnified in consequence of his admitting the said *Bradbury* to the liberties of the said prison, but should at all times indemnify and save harmless the said sheriff in the premises, then the bond to be void, otherwise, &c. That the defendant *Bradbury* escaped, and that the bond on request of the plaintiff, was assigned to him by the sheriff in due form of law. That the plaintiff received the bond, and is entitled by law to all the benefits of the same. And this they are ready to verify, and thereof pray judgment, that the plaintiff from having and maintaining his action may be barred.

To this plea plaintiff demurred, and joinder.

There was a second count in the declaration in debt upon another judgment rendered the same day by the same Justice of the Peace in favour of the plaintiff against the defendants, for damages and costs to the same amount, which was also alleged to be in full force, and in no part paid or satisfied. A like plea in bar, offering to verify similar facts *mutatis mutandis*, was pleaded by the defendants to this count likewise; and demurrer with joinder.

The demurrer was argued at this time. The question litigated is, whether, when a creditor has taken out a writ of execution upon a judgment against two, one of whom has been committed upon it to prison, admitted to the liberties, and escaped, and the bail-bond has been assigned by the sheriff and received by the creditor, he can maintain debt on such judgment against both.

It was insisted by the demurrant, that the action could be well maintained. His counsel cited 3 *Com. Dig.* p. 647. where it is laid down, "that after an

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escape the plaintiff may have debt or a *scire facias* against defendant upon the former judgment;" and so held 1 *Morgan's Essays*, p. 23. and the reason given is, that it would be hard to oblige the creditor to rely solely upon the sheriff, who may be insolvent.

In support of the plea in bar it was said, That the *dictum* in the *English* books could not apply. That the system of imprisonment for debt in *England* is different from ours, and therefore the decision of their Courts could reflect no light upon the subject. That even there the right of the creditor to maintain an action upon a judgment after a commitment and escape, had been long disputed in the Common Law Courts, and never settled; which occasioned the statute 8 and 9 *William* III.

But if the positions cited are correct, they are not applicable to the case in question. The case here is, that the bail-bond has been assigned and received by the plaintiff; so that, if he had on escape an election to sue for the escape or resort to debt on the former judgment, he has made this election by receiving the bail-bond as assignee of the sheriff.

Curia. The question to be considered has been already stated. It must be resolved by a correct construction of the several statutes which form our system, made to compel the payment of debts.

Upon a judgment debt the creditor may take out his writ of execution against his debtor or debtors. This writ combines the *English* writs of *capias ad satisfaciendum*, *fieri facias*, *de bonis*, and *elegit*, with

a further power respecting the levy upon real estate, unknown to the *English* law.

The creditor has a right to elect which power he will put in effect to collect his debt. If he directs the officer to put in force the *capias ad satisfaciendum*, and the debtor is arrested and committed to prison, all the other powers in the writ cease. He cannot then levy on the personal or real estate of the debtor. He has resorted to the highest compulsory process the law allows; even the depriving his debtor of his personal liberty.* The law then considers the debtor to be kept *in areta et salva custodia*. The debtor is to be kept in close confinement until he pays the debt, or is discharged according to law. If he goes beyond the prison walls, either with the creditor's consent, or by escape, either voluntary or negligent in the sheriff, the judgment in the first instance is satisfied in contemplation of law, the creditor having abandoned the means allowed him by the law for collecting his debt; which the law presumes he would

* In *November*, A. D. 1803, the Legislature enacted, that when any creditor, by virtue of an execution *as aforesaid*, (vid. the act,) shall cause the body of any debtor to be committed to gaol, or in case any debtor who has been committed to gaol shall continue in gaol for the space of three months, the creditor shall have full power to discharge the debtor from prison, and thereupon take out an *alias* execution, which *alias* execution any of the Courts in this State are hereby authorized to issue, and levy the same on the property of such debtor, but shall not again imprison the body of such debtor for the same debt. Sect. 3. of an act in alteration of and to amend an act, entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned therein, passed the 9th day of *March*, A. D. 1797. *Vermont* Stat. c. xxviii. No. 8. vol. 1. p. 300.

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not have done without satisfaction. In the latter case the creditor is to look for the payment of his debt to the sheriff, to be recovered in an action for the escape against him who, as a guard against his *insolvency*, is under bonds with sufficient sureties to secure the creditor against eventual loss. But as the policy of depriving a person of liberty to enforce the payment of debts, has been of late much questioned, (for of the inhumanity of it there can be but little doubt,) the Legislature, without abandoning this ancient practice, have humanely ameliorated the confinement by suffering the imprisoned debtor to inhale a purer air without the walls, but still within the precincts, or what are called the liberties of the prison; and as a security to the sheriff, who is still considered the prisoner's keeper, that this indulgence of the law should not be abused, and the sheriff injured by any escape, and at the same time to carry into effect the original intent of the *capias ad satisfaciendum*, the prisoner on this occasion must execute a bond with sufficient sureties to indemnify the sheriff against his escape. If an escape happens, an action lies by the creditor against the sheriff; but the right to bring this action is suspended until the creditor shall have applied for the assignment of such bond, and until, by process against the obligors, it shall appear that they are unable to satisfy the judgment recovered against them. If it is thus found that they are not able, the action may be maintained against the sheriff. In all cases of commitment upon the *capias ad satisfaciendum*, and escape, the creditor is to look immediately or eventually to the sheriff; and in no such case is debt on the original judgment to be resorted to.

But if a question might be made, whether the creditor might not, on escape from the liberties, maintain debt on his former judgment, if he had immediately elected to seek his remedy on that rather than upon the bail-bond, as sheriff's assignee, yet, if he had elected to become the sheriff's assignee, and received the bond into his custody, certainly he could not then resort to debt on his former judgment; for this would be to deprive the sheriff of his right to prosecute such bond, without any advantage to the creditor.

Regularly, debt cannot be maintained on a judgment, unless a return of the writ of execution is shown by which it shall appear that the execution has not been satisfied in whole or in part, or it is made evident by the record that no such writ ever issued.

Regularly, debt cannot be maintained on a judgment, unless a return on the writ of execution is shown, by which it shall appear that the execution has not been satisfied in whole or in part, or it is made evident by the record that no such writ ever issued.

A correct declaration in debt on judgment always alleges, that the judgment is not satisfied. This is so essential, that if omitted the declaration would be ruled insufficient on demurrer. When the execution has issued, the creditor is authorized by law, with the aid of the proper officers of government, to collect his judgment debt, and the issuing of such execution is made part of the record. If the creditor will not produce it when in his power, it will be presumed that it is satisfied; but when produced, if it appears that the debtor has been imprisoned upon it, this will be considered a sufficient satisfaction of the judgment to bar a recovery upon the former judgment. The creditor must then look to the sheriff as keeper of the prison, to whom the debtor may have paid the contents of the execution; or in case of escape from close prison, to whom he may apply for

A correct declaration in debt on judgment always alleges that the judgment is not satisfied. This is so essential that if omitted the declaration would be ruled insufficient on demurrer.

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satisfaction to the amount of his execution and costs; or in case of escape on bail for the liberties, for the assignment of the bail-bond; and this failing on process to compensate him in the dernier resort to the sheriff himself.

Let judgment be therefore entered for the defendants.

Judgment for the defendants.

Titus Hutchinson and *Nathaniel Chipman*, for plaintiff.

Charles Marsh and *Nicholas Baylies*, for defendants.

WILLIAM STRONG *against* ABRAHAM HOYT.

Trover brought by an officer to recover for the conversion of property attached by him on mesne process against the surety of the defendant, who joined with him in executing an accountable receipt for the property, will not lie if the property is not demanded on the execution within 30 days after final judgment, if it has been delivered by the surety to the lawful owner, the principal in the accountable receipt.

TROVER, and rule in arrest.

The plaintiff, in his capacity of constable of the town of *Hartford*, brought his action of trover for two barrels of cider containing 64 gallons, and one hogshead of *West India* rum, containing 100 gallons, which in the usual form he alleged that he possessed and lost, and which were converted by the defendant on the first day of *September*, 1800.

It was shown in evidence, on trial of the general issue, to the Jury, That the plaintiff, as constable, had attached the chattels as the property of *John Starr*, at the suit of *Hume & Hastings*, on the 25th of *January*, 1797. That he made due return of the writ, *February* 11th, 1797, in which he returned that he

had attached this property. That on the 26th of *March*, the defendant, with *John Starr*, executed to him a receipt by which they acknowledged to have received the property, and promised to redeliver it when demanded. That at the Supreme Court, *August* term, 1800, final judgment was rendered for *Hume & Hastings* against *John Starr* for 203 dols. 9 cts. damages, with costs, and execution issued the 30th of *August*. That the writ of execution was delivered to *Stephen Conant*, a deputy of the sheriff of *Windsor* County, to serve and return. That on the 17th of *September*, 1800, *Conant* demanded the property attached of the plaintiff, and not receiving it, and *John Starr* having fled from his bailiwick, he returned the execution *non est*.

That the plaintiff *Strong* demanded the redelivery of the property by the defendant on the 2d of *March*, 1801, who had some time before delivered it to *John Starr*.

The plaintiff had a verdict for 148 dols. 79 cts. damages and costs.

And now the defendant moved for a rule upon the plaintiff to show cause why the verdict should not be set aside, and the judgment arrested, because the verdict was contrary to law.

Rule granted.

The question under the rule was, that as the action was not brought upon the receipt, and all the property *Strong* had in the goods was special, as an officer holding them in the custody of the law by the attachment, and one of the receiptors being the lawful owner, whether the plaintiff, as an officer, could have any lien upon, and consequently any right to recover damages for the withholding this property, he not

Strong v. Hoyt.

having demanded it within thirty days after the rendering final judgment in the suit upon which the property was attached?

Curia. The Court observed, that if the action had been brought upon a receipt solely executed by a person who had no interest in the property attached, the plaintiff, as the attaching officer, could have maintained an action upon it at any time within the limitation act, as he was accountable to produce such property on the levy of the execution for the benefit of the plaintiff at whose suit it was attached; and even if such plaintiff failed in his suit, as attaching officer, he could recover the property for the purpose of restoring it to the lawful owner; but when property is attached and receipted by the defendant, and goes into the possession of him who owns it, though another should sign the receipt with him as surety, the officer taking the receipt loses his lien on the property attached and receipted, after the expiration of thirty days from the rendering the final judgment, to respond which the property was attached.

That in trover the case is much stronger for the defendant; for here the whole right of action will rest on the special property acquired by the plaintiff in his official capacity, from attaching it by process in law, without a shadow of an express promise in the defendant to redeliver it. That the duration of this special property is circumscribed by the statute—

Vermont Stat. vol. 1. c. vi. p. 67. s. 33.

"That when the goods or chattels of any person shall be taken on mesne process, the same shall be holden thirty days from the time final judgment shall be rendered in said suit; and unless the plaintiff in said suit shall, within the term of thirty days from

the time of rendering such judgment as aforesaid, take said property in execution, the same shall be discharged from said process, and be no further liable to answer said judgment, than though the same had not been attached."

That it being in evidence that the defendant *Hoyt* had no interest in the property attached, but merely acted as surety for *John Starr*, the rightful owner, and no demand having been made upon the defendant while he was responsible, to redeliver it, he is justified by the law in suffering it to go into the possession of *John Starr*, and not accountable to the present plaintiff.

Rule made absolute.

Judgment for the defendant.

Baylies, for plaintiff.
Buck, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ORANGE COUNTY, SEPTEMBER TERM, A. D. 1802.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, *STEPHEN JACOB*, } Assistant Judges.

STATE *against* AARON CALDWELL.

The advising a person against whom the sheriff has a precept, and whom he is about to arrest, to draw a line on the ground and to forbid the officer to pass it, and asserting that if the sheriff passed the line and the person killed him, the law was on the person's side, will support an indictment against the adviser for impeding and hindering a civil officer in the execution of his office.

INDICTMENT for impeding and hindering the civil authority.

The indictment charged the defendant with impeding and hindering *Martin Pinney*, in the execution of his office of deputy to the sheriff of *Orange* County, in the levy of a writ of execution against one *William Moore*, at *Thetford*, on the 12th of *August*, A. D. 1801, *contra formam statuti*.

Upon plea of *non cul*, the following facts appeared in evidence to the Jury:

That on the day stated in the indictment, *Pinney*, the sheriff's deputy, had four writs of execution against *Moore*. That as he was approaching to arrest him, the defendant *Caldwell* said to *Moore*, "Draw a line on the ground: draw a line quickly, and if the sheriff steps over it you may knock him down safely. Draw a line, give him warning, and then the law is on your side." *Moore* then drew a line on the ground, and forbade the sheriff to pass over it. As the officer was proceeding towards it, *Caldwell* put his hand lightly on his shoulder, and said, "*Pinney*, you had better stop: *Moore* will injure you; and if he kills you, the law is on his side." The officer immediately passed the line, and *Moore* knocked him down with a stake, but he recovered himself, and arrested *Moore*.

During the trial it appeared by the witnesses, that the sheriff had not produced his *præcipe*, but that *Moore* had been informed that it was in his possession.

It was insisted by the defendant's counsel, that the officer should have produced his warrant; that if *Moore* had knowledge of it, this might be sufficient as to him; but that though a public officer is not obliged to show his warrant to him who is the object of it, he is obliged to show it to strangers, or at least divulge to them that he has a process to execute, before any intent to obstruct him in his official duty can be imputed to them.

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A sheriff is not obliged to show his precept, either to the person to be arrested by it, or to the bystanders.

Sed per Curiam. The sheriff, as the known and first executive officer of the County, is not obliged to show his warrant to any one. His deputies are by the statutes clothed with the same power, and their names and deputations are put upon the public records of the County, that their appointment to office may be known to all, and all are obliged to obey these officers in carrying into effect the legal orders of government; and when these officers attempt to apprehend any one, the people will conclude they are legally empowered; but here it is apparent the defendant had science of the officer's having a process to execute.

The principal point in defence was, that the whole proof on the part of government amounted to the defendant's giving ill-timed and unsound advice; but to advise to the impeding and hindering an officer in the execution of his duty, was not against the statute; for the words of the statute are, "that if any person or persons shall impede or hinder any officer, judicial or executive, civil or military, under the authority of this State, in the execution of his office."

Vermont Stat. vol. 1. c. xxxiii. p 353. s. 5.

But the Court, in their charge to the Jury, said, that as the statute did not, by any circumlocution, define the crime, the intent of the Legislature by the words, "impeding and hindering an officer in the execution of his office," must be found by the Jury upon common law principles. That the obstructing the execution of lawful process had always been considered at common law an offence of a high and presumptuous nature; so much so, that an obstruction to criminal process had formerly been held to make the offender a *particeps* in the felony, if the person to be arrested was charged as a felon. Indeed this.

offence strikes at the very foundations of government.

That a question is submitted to their consideration, whether this offence could be committed by a person's advising another to resist an officer charged with the execution of a legal process. But the evidence shows something more than mere advice. The defendant directed *Moore* to draw a line, and forbid the officer to pass it. When the line of defiance was drawn, he put his hand on the officer's shoulder, and cautioned him "not to pass over it," assuring him, "if *Moore* killed him he would be justified by the law." That if the Jury considered that the defendant's conduct impeded or hindered the officer in the execution of his office, they must find him guilty.

The position of the defendant, "that if a person about to be arrested by a sheriff upon a legal process, draw a line on the ground, and forbid the officer to pass over it, the officer passed it at the peril of even his life," might seem to be so absurd as not to require any particular comment; for the Court trusted, that so baneful a doctrine had not, owing to the good sense of the people, been widely disseminated.

That it is true there are cases in which the law allows a man to defend himself even unto the death of the assailant, if he could be repelled only by depriving him of life; such as a burglarious entry into a person's house, a robbery, or when a man is acting in defence of the chastity of his wife or daughter: but in these cases there is no occasion to draw a line, for the law has already drawn a line, beyond which the burglar, the robber, or the ravisher shall not pass with impunity. But when a known officer of government has a legal precept to execute, resistance is a

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crime; and if a line is marked on the ground, and the officer warned not to pass over it but at his peril, if death, mayhem, or battery should happen to the officer in consequence of his passing such line, it would be no justification on indictment for the crime. It would not amount to even a palliation, but would rather go to aggravate the offence, by showing that the injury was done after sufficient time to deliberate.

The Jury found the defendant guilty.

C. Bulkley, for the State.
Orimel Hinkley, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CALEDONIA COUNTY, SEPTEMBER TERM, A. D. 1802.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

DAVID DUNBAR *against* NATHAN PARKS.

THE plaintiff brought trover for a horse. On the trial of the issue to the Jury, after the examination of all the witnesses on the stand, and before argument, Mr. *Sias*, one of the Jurors, observed to the Court, that he knew some matters which had relation to the cause; and requested information whether it would be improper for him to communicate his knowledge to his brethren of the panel after they were charged, and should retire to the Jury-room.

A Petit Juror may be sworn and testify as a witness of facts which he may know relative to the cause in issue; but he must not be asked a question the answer to which may indicate his opinion of the merits of the cause.

Dunbar v Parks.

Curia. As the Juror had a doubt in his mind relative to his conduct, it is highly commendable in him to apply to the Court for advice. Let the witness's oath be administered to him.

He was accordingly sworn, and testified, standing in the Jury-box, to a material fact.

Upon his cross-examination,

John Mattocks, counsel for the plaintiff, put a question to the witness, the answer to which would indicate for which party as a Juror he would eventually decide.

Sed per Curiam. This must not be suffered. Examine the witness solely as to facts, and such as came to his knowledge before he was sworn as a Juror.

John Mattocks, for plaintiff.
William Griswold, for defendant.

NATHAN GLIDDEN, Appellant,
against
DAVID ELKINS, Sheriff, Appellee.

Whenever the Court discover that their jurisdiction of a cause has been expresslytaken away by statute, they will dismiss the same *peremptorily.*

CASE for a voluntary escape. For that the plaintiff, on the 5th of *January*, 1801, by the consideration of Mr. Justice *Blanchard*, recovered judgment against one *Levi Osgood*, for the sum of *7 dols.* 23 *cts. damages, and* 3 *dols.* 6 *cts. costs of suit;* that he had taken out a *pluries* execution, and delivered

the same to the defendant to serve and return; that the defendant arrested *Osgood*, committed him to prison, and then voluntarily permitted him to escape.

General issue pleaded, and joinder.

Upon the opening of the cause to the Jury, the Court noticed, that the amount of the plaintiff's claim was not within the jurisdiction of the Court, and ordered a nonsuit to be entered.

Ware, for the plaintiff. We hope the Court will not notice a want of jurisdiction, unless submitted to their consideration by proper issue. The Court may know that there is a misnomer or improper commorancy in a writ, but they never quash a process unless the defect is taken advantage of by the defendant in abatement. A party may waive exception to the jurisdiction.

Where jurisdiction is expressly taken from a Court by statute, it cannot be created in them by consent of parties, much less by the laches of a party in neglecting to plead an available plea.

Curia. There is a wide distinction between a mere dilatory plea as a matter of abatement, which is often cured by imparlance, and is the subject of jeofails, and a want of jurisdiction, which cannot be cured by successive imparlances, or be reached by amendment. A party cannot give jurisdiction by waiver of plea. This Court have ever considered that jurisdiction cannot be created in them where it is expressly, by even consent of parties, much less by the laches of a party in neglecting to plead, an available plea.

The Legislature, with a laudable design to prevent the accumulation of costs in small suits, have given original jurisdiction to Justices of the Peace, and appellate jurisdiction to the County Courts, of all suits where the demand is above seven dollars, and

Glidden v. Elkins.

where it does not exceed thirty-three dollars in unliquidated, and fifty-three dollars in liquidated demands, to the exclusion of any jurisdiction in this Court. This beneficial statute had formerly been construed to give concurrent jurisdiction to the County Courts and Justices of the Peace. But the Legislature, at their last session, passed an explanatory act, which enacts, "that the several County Courts shall not hear, determine, or adjudge, on any action or suit which is originally made cognisable before a Justice of the Peace, unless such action or suit shall be entered in such Court by appeal."

Vermont Stat. vol. 1. p. 101. passed *Nov.* 5, 1801.

The Court are gratified in observing, that *this* action was commenced before the passing of the explanatory act, at a time when the right of bringing it originally before the County Court it seems had been considered by some as proper; for it certainly would not have been correct in an officer of this Court to have instituted an action in the face of the explanatory statute. But if such cases should happen, the Court will at any stage of the cause, direct such action to be dismissed, with costs to the defendant.

Let a nonsuit be therefore entered, and full costs be taxed for the defendant.

Nonsuited.

Jonathan Ware, for the plaintiff.
Daniel Buck and *John Mattocks*, for defendant.

ZACHARIAH CHILDS,
Assignee of RANKIN, Sheriff, Appellee,
against
JAMES MORSE and LEVI OSGOOD, Appellants.

DEBT on gaol-bond.

The plaintiff declared in debt on gaol-bond, demanding 100 dollars, the penal sum of the bond; and alleged, that on the 16th *July*, 1800, by the consideration of *Horace Beardsley*, Esquire, Justice of the Peace, he recovered judgment against the defendant *James Morse*, for the sum of 11 dols. 37 cts. damages, and 2 dols. 4 cts. costs of suit. That on the 15th of *August* following, he purchased out his *alias* writ of execution upon the judgment, and delivered the same to the constable of *Cabot*, who committed *Morse* to the prison in *Danville*. That on the same day the defendants executed the bail-bond to *Rankin*, sheriff of the County, and keeper in chief of the prison, to indemnify him against any escape. That on the 10th of *October*, 1800, the defendant *Morse* escaped from the prison, having never paid the debt to the plaintiff, nor been any way legally liberated, whereby the sheriff became liable to pay the debt and costs to the plaintiff, and was thereby subjected to loss and damages, by reason whereof the said writing obligatory became forfeit. That the sheriff assigned the bond, according to the statute provision and form, to the plaintiff. The declaration then concludes with the usual profert and averment.

Writ served 19th of *December*, 1800.

To this declaration the defendants pleaded in bar.

The certificate of a Judge of the County Court, and Justice of the Peace, prescribed in the act relating to gaols and gaolers, &c. and directed to the sheriff as keeper in chief of the gaol, is a sufficient bar to an action brought against him for the escape of a prisoner liberated in pursuance of such certificate, and if the prisoner had been admitted to the liberties of the gaol upon bail-bond, the certificate delivered by the Judge and Justice to the prisoner may be pleaded in bar to an action upon the bond, without setting forth circumstantially the mesne process.

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And now the defendants come, &c. and defend the force and injury, when, &c. and plead and say, that the plaintiff from having and maintaining his said action against the defendants ought to be barred. Because they say, that although true it is, that the plaintiff recovered judgment in his favour against the said *James Morse*, and took out execution on said judgment against the said *James*, and caused him to be committed to prison, as set forth in the plaintiff's declaration; and although true it is, that the defendant, said *James*, was admitted to the liberties of the said prison, and after the admission of the said *James* to the liberties of the said prison, the defendants executed and delivered to the plaintiff the bond or writing obligatory in the plaintiff's declaration described, yet they say, that after the commitment of the said *James* to prison as aforesaid, and after the making, executing, and delivering the said writing obligatory to the sheriff as aforesaid, and before the said *James* quitted the liberties of said prison, and before the liberties of the same were in any way broken by the said *James*, and before the assignment of said writing obligatory by the said sheriff to the plaintiff as set forth in his declaration, to wit, on the 16th day of *October*, A. D. 1800, *Samuel Chamberlain*, Esquire, then, and for more than sixty days then next following, one of the Justices of the Peace within and for said County of *Caledonia*, and *William Chamberlain*, Esquire, then, and for more than sixty days then next following, one of the Judges of the County Court, within and for said County, on application of said *James*, issued their certain precept in due form of law, called a citation, by them signed in their capacities aforesaid, in the words following, to wit:

STATE OF VERMONT.

Caledonia, ss. To the Sheriff of *Caledonia* County, his deputy, or either of the constables of *Peachum*, in said County, greeting.

Whereas *James Morse*, of *Cabot*, in said County, has this day made application to me, *William Chamberlain*, Esquire, one of the Judges of the County Court, within and for said County, and *Samuel Chamberlain*, Esquire, one of the Justices of the Peace for said County, stating to and informing us, that he is now confined a prisoner in the common gaol in *Danville*, in said County, by virtue of an execution in favour of *Zachariah Childs*, of, &c. for the sum of 11 dols. 37 cts. damages, and 2 dols. 4 cts. costs of suit, and for 25 cents for an original execution, and 25 cents more for an *alias*, and for 2 dols. 25 cts. for commitment fees, signed by *Horace Beardsley*, Esquire, one of the Justices of the Peace within and for the County of *Caledonia*, bearing date the 15th day of *August*, A. D. 1800, and returnable within sixty days from the date of the same, directed to the sheriff of *Caledonia* County, his deputy, or either of the constables of *Cabot*, in said County, issued on a judgment recovered before the said *Horace Beardsley*, Esquire, Justice as aforesaid, at a Court holden at *Cabot* the 16th day of *June*, 1800, on a proper action of contract and promise, and that the said *James* hath not estate either real or personal, in possession, remainder, or reversion, to the value of twenty dollars, necessary apparel and bedding for himself and family excepted, nor sufficient to pay the damages and costs for which he is committed to prison, and that he has not disposed of the same since his commitment, except for the necessary subsistence

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Vermont Stat. vol. 1. p. 280.

of himself and family, nor sufficient to support himself in said prison, and praying to be discharged from said imprisonment, on taking the oaths prescribed in an act, entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned therein.

These are therefore,

By the authority of the State of *Vermont*,

To command you to make service to *Jonathan Ware*, Esquire, of *Peachum* aforesaid, attorney for said *Zachariah Childs*, that he, before said *William Chamberlain*, one of the Judges as aforesaid, and *Samuel Chamberlain*, one of the Justices of the Peace as aforesaid, on the 10th day of *November* next, at two o'clock in the afternoon, at the house of *John Baldwin*, of *Danville* aforesaid, appear and show cause, if any he has, why the said *James* should not be admitted to the oaths aforesaid, and be thereupon discharged from his said imprisonment.

Hereof fail not, but of this writ and your doings hereon make due return according to law.

Dated at *Danville*, the 16th of *October*, A. D. 1800.

William Chamberlain, Judge.
Samuel Chamberlain, Just. Pacis.

Which said execution, described in said citation, is the same execution described in the plaintiff's declaration, and the same issued on a judgment recovered in a proper action of contract and promise; and the said *Ware*, the defendants aver, was the attorney who brought forward said suit on which said execution issued as aforesaid; and the said *James*, on the 18th day of *October* aforesaid, caused the said citation to be delivered to *Benjamin Sias*, who then, and

for sixty days then next following, was a legal deputy under *John Rankin*, Esquire, sheriff of said County of *Caledonia*, to serve and return according to law; and the said *Benjamin*, so being sheriff's deputy as aforesaid, afterwards, to wit, on the day and year last aforesaid, duly and legally served said citation on the said *Jonathan Ware*, and duly and legally endorsed his return of service on the said citation in the words and figures following, to wit:

October 18th, A. D. 1800.

Then served the within precept by delivering a true and attested copy of the same to *Jonathan Ware*, of *Peachum*, with my return thereon.

Attest,

Benjamin Sias, Deputy Sheriff.

Fees, 3 dols. 50 cts.

Which said citation being served as aforesaid, and duly returned to said Justices at the time and place therein appointed for trial, the said *William*, Judge as aforesaid, and the said *Samuel*, Justice as aforesaid, then and there opened their Court for the purpose in said citation expressed, and the parties being called in Court appeared; whereupon it was then and there considered by said Justices, that said Court be continued until the 12th day of *November* aforesaid, at two o'clock in the afternoon, to be holden at the same place; at which time and place the said Justices opened said Court agreeably to said continuance, and the parties being called, the said *James* appeared; but the said *Zachariah Childs* being three times publicly called, did not appear; whereupon, after examining said *James Morse*, upon inter-

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rogatories under oath relative to the situation and circumstances of his property, the said Justices were of opinion, and it was by them then and there considered, that the said *James* was a proper subject of relief under the act in such cases made and provided, and that he ought to be admitted to the oath by the statute in such case made and provided, and he thereupon be discharged from his imprisonment; and the said Justices did then and there administer to the said *James* the oath by the said statute in that case made and provided, and did then and there execute and deliver to the said *James* a certificate in writing by them subscribed in their capacities as aforesaid, in the following words, to wit:

STATE of VERMONT.

Caledonia, ss. To all people to whom these presents shall come, Greeting:

Whereas *James Morse*, a prisoner in the common gaol in *Danville*, in the County of *Caledonia* aforesaid, on an execution at the suit of *Zachariah Childs*, of, &c. for the sum of 11 dols. 37 cts. damages, and for 2 dols. 4 cts. costs of suit, signed by *Horace Beardsley*, Esquire, one of the Justices of the Peace within and for said County of *Caledonia*, and dated at *Cabot* the 15th day of *August*, A. D. 1800, has this day taken the oath prescribed in an act entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned therein, the said *Zachariah Childs* having been duly notified did not attend; and in our opinion the said *James Morse* ought to be discharged. Witness our hands at *Danville*, the 12th day of *November*, A. D. 1800.

William Chamberlain, Judge.
Samuel Chamberlain, Just. Pacis.

And the said Justices did then and there execute and deliver to *John Rankin*, then sheriff as aforesaid, and keeper in chief of the gaol in said *Danville*, one other certificate in writing, subscribed with their proper hands, in their capacities as aforesaid, in the following words, to wit:

State of Vermont.

Caledonia County, ss.

To *John Rankin*, keeper in chief of the gaol in the County of *Caledonia*, Greeting:

Whereas *James Morse*, a prisoner in your custody, on an execution of *Zachariah Childs*, of, &c. (describing the suit, execution, &c. as in the certificate to the prisoner,) has this day taken the oath prescribed in an act entitled, an act relating to gaols and gaolers, &c. the said *Zachariah* having been duly notified did not attend; and in our opinion the said *James Morse* ought to be discharged.

Witness our hands at *Danville*, this 12th day of *November*, 1800.

William Chamberlain, Judge.
Samuel Chamberlain, Just. Pacis.

And said *James* was thereupon, by the order and decision of said Justices, discharged from his said imprisonment, and from said prison and liberties of the same, according to the form, force, and effect of the statute in that case made and provided, and did thereupon depart from said prison, and the liberties of the same, and go at large whither he would; and the said *James* never escaped from said imprisonment, nor from the liberties of the said prison, before he was duly and legally liberated and discharged from

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his said imprisonment as aforesaid; which said discharge and departure from said prison, is the same escape and going at large after his said commitment and imprisonment set forth and complained of in the plaintiff's declaration. All which the defendants are ready to verify and prove in such manner as the Court shall order and appoint. Wherefore the defendants pray judgment of the Court here, whether the plaintiff from having and maintaining his said action against the defendants ought not to be barred, and they recover their costs. By their attorney,

William Mattocks.

And the plaintiff to the defendants' plea in bar in manner and form above pleaded, replies and says, that he ought not to be barred, because, he says, that the said plea in bar, and the matters therein contained, are insufficient in law to bar the plaintiff from having and maintaining his said action against them, and this he is ready to verify, whereof he prays judgment. For his debt and costs and causes of demurrer, the plaintiff, according to the statute in such case made and provided, makes and sets down the following, to wit:

First. That the citation in the plea in bar mentioned, is not to the creditor as is required by the statute.

Secondly. That no service of such citation has been made on the creditors. By his attorney,

*Jonathan H. Hubbard,**

* As this may be considered as a leading case, the pleadings are reported more at large than might seem otherwise necessary.....*Reporter.*

To this replication the defendants demurred.

Hubbard, for the demurrant. The statute upon which the plea in bar is said to be predicated in its operation when correctly pursued, deprives the creditor of a common law right, and therefore ought to be strictly construed. If the defendants would shelter themselves under the statute process, they must show that it has been strictly pursued.

We demur to their plea,

First. Because the statute provides, that the citation must in all cases be to the creditor, "and such Justices, or either of them to whom application shall be made, shall issue a citation to the *creditor or creditors* in such execution, of such prisoner's desire of taking the privilege and benefit allowed by this act." Here the statute is express; but the citation in the plea is to *Jonathan Ware*, attorney for said *Zachariah Childs*.

The citation being issued to the creditor, the statute then provides three several modes of serving such citation, the latter to be resorted to only in case the former cannot be effected.

First. Upon the creditor personally, or upon his executor or administrator; and in case he or they do not live within this State, *then*,

Secondly. "*Upon* his or their agent or attorney, *who brought forward the suit;* but in case there be no such agent or attorney living within the State," then

Thirdly. "A true and attested copy of the citation shall be left with the Clerk of the Court or Justice of the Peace by whom the execution was signed."

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When a statute points to a second alternative, which is not to be resorted to unless the first cannot be had, it is necessary, in resorting to such alternative, to set forth in the process that the first could not be effected, or else there is no foundation for the process upon the second.

This citation does not set forth, that *Zachariah Childs*, the creditor, lived without the State, but simply summons *Jonathan Ware* to appear and show cause, &c. which, if the creditor *Childs lived* within this State, (which is a comprehensive term, and implies not only habitancy, but occasional residence,) would be manifestly bad; and as the citation does not set forth that the creditor lived without the State, is certainly ill.

Further. It is not merely the attorney or agent of the creditor which the citation must be served upon, but particularly "the attorney or agent who brought forward the suit on which the judgment whereon the person stands committed was rendered." Here the citation goes simply to *Jonathan Ware*, attorney to *Zachariah Childs*.

Therefore we make our second exception to the process, that no service of such citation has been made on the *creditor*. The whole object of the citation is to notify him, and this, the law says, in case he lives out of the State shall be done by serving the citation, not upon any person who may have a general power of attorney, or a letter of attorney to transact any particular piece of business, but on the particular agent or attorney who brought the suit. There is such apparent reason for this statute distinction, that we trust the Court will see that it is carried into effect.

We have an additional reason to offer, why the Court will be peculiarly careful to see that this statute process is correct: because the errors of the Court who issue it cannot be rectified by any other mode than by decision upon the pleadings to an action instituted by a creditor who has been injured by defective and illegal process, as no appeal lies from this Court of Gaol Delivery, nor are their proceedings subject to revision, or their decisions to reversal, by writ of error.

Mattocks, for the defendant, arose to reply, but was interrupted by the Court.

Curia. The citation appears to have been incorrectly drafted, although the object of the statute has been obtained by the service of it. But the Court do not incline to hear further upon exceptions to the mesne process of what is commonly called the Court of Gaol Delivery. They wish to hear a question of greater magnitude argued, which may decide the sufficiency or insufficiency of the bar, *over* any defects in the primary process.

It appears by the plea, that the defendant *Morse*, under the provisions of the statute relating to gaols and gaolers, has applied to a Justice of the Peace and a Judge of the County Court, for a citation to his creditor, to show why he should not be admitted to the benefits of the act. That such proceedings were had by the Court. That on the 12th of *November*, 1800, they admitted the defendant *Morse* to the oath prescribed in the act, and gave their opinion that he ought to be discharged from his imprisonment, and on the same day made and subscribed a certificate in

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the statute form, and delivered it to the prisoner, and also another certificate, which they delivered to the sheriff as keeper in chief of the prison, in both which, in the words of the statute, they declared, that in their opinion the prisoner *Morse* ought to be discharged.

The question is, what is the legal operation and effect of these certificates?

The condition of the bond declared upon is in substance that the prisoner should remain within the liberties of the prison until legally discharged. The bond is prosecuted by the assignee of the sheriff, and the plaintiff stands in his shoes. If the mesne process is defective, will these certificates operate a legal discharge of the prisoner?

It appears, that the Legislature, in pursuance of the spirit of the constitution, have provided, that a poor citizen, imprisoned for debt on contract, shall not be deprived of his personal liberty upon proof of his poverty before a proper Court. A Court has been constituted for this purpose, from whose decision there is no appeal, and no writ of error lies. But the act gives them plenary power to correct defects in their process, and to tax costs against the applicant. The Court may likewise examine the prisoner upon a *voire dire*, may hear evidence to controvert his testimony, and may adjourn from time to time, until they obtain all the evidence of which the subject is capable. If in their opinion he ought not to be admitted to the oath, he must remain in prison; and if he make a second application, it must be to the same magistrates if in office; but if the Court are of opinion that he ought to be admitted to the oath, it is then administered, and the Judge and Justice make out two certificates under their official signatures,

one to be delivered to the prisoner, and the other to the keeper of the gaol, certifying that such oath has been administered, and that in their opinion the prisoner ought to be discharged. The prisoner, after paying certain charges, in the words of the statute, shall thereupon be discharged, and *his body* be thereafter exempted from execution for the same debt.

In what situation do these proceedings place the sheriff or the bail? In case the debtor is a close prisoner, and the certificate is delivered to the sheriff, and doubts should arise as to the correctness of the mesne process, is the sheriff to be subjected to this dilemma, either to liberate his prisoner, and risk an action for an escape, founded on the supposed irregularity of the mesne process; or shall he, by closing his prison bars on the debtor, expose himself to an action for false imprisonment? or shall this certificate be a sufficient justification to the sheriff, however irregularly obtained?

Will the case materially differ, if the debtor be admitted to the liberties of the prison? In such case, what will be the effect and operation as to the sheriff and the bail? for the sheriff is here interested. Although the action is brought by his assignee, it may be but a preparatory step to an action against him for an escape; for should the bail fail to respond the debt, an action lies directly against the sheriff, and he would be driven to the very defence made in the plea in bar; and in such defence the effect and operation of the certificate would present itself in the same point of view as it respected the sheriff, as if the debtor had been his close prisoner.

In an action against the bail, the same defence is made, and the pleadings will turn upon the legal ef-

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fect of the certificates, abstracted from any defects in the mesne process before the Court of Gaol Delivery.

Upon the point of the legal effect and operation of these certificates, it appears to the Court, that as the statute does not go to defeat the debt, but merely to discharge the imprisoned debtor, and to exempt his body from a subsequent commitment upon the same demand, as the Legislature have constituted a Court of original and exclusive jurisdiction, to issue mesne process to decide upon the regularity of such process, and have finally rested the discharge of the prisoner solely upon their opinion after hearing, that all defects in such process can only be taken advantage of before them. That when the Justice and Judge make out the statute certificates, an exhibition of them to the sheriff, or even of that peculiarly addressed to him as keeper in chief of the gaol, is a sufficient warrant for him to liberate the prisoner if closely confined, and a sufficient justification against any escape, if the prisoner be admitted to the liberties. That the certificate alone, without setting forth circumstantially the mesne process, is a sufficient bar to an action of debt on the prison-bond, when brought against the bail.

These are the present impressions of the Court. They are, however, inclined to hear argument.

Upon these observations being made by the Court, the counsel for the plaintiff declined further argument, and judgment was entered for the defendant.

J. H. Hubbard and *Jonathan Ware*, for the plaintiff.
William Mattocks, for defendants.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

FRANKLIN COUNTY, JUNE ADJOURNED TERM, A. D. 1803.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

DARIUS JACQUES, Appellee,
against
JOSEPH GRISWOLD, Appellant.

TROVER for a horse and sleigh, a quantity of shipping furs, and forty pounds of snuff.

Plea, general issue. Trial by Jury.

The defendant conceded the taking of the property, but justified in that he, as deputy of *David Russell*, Esquire, collector of the port of *Alburg*,* seized

The *United States* collector of a port in this State is not obliged to exhibit his commission in Court to justify his seizing property for a breach of the revenue laws, but his deputy must show his commission in such case.

* Misspelled ALLBURGH, in the acts of the *United States*. See Surveyor-General *Whitelaw's* several maps.

Jacques Griswold. it for a breach of the revenue laws of the *United States.*

Curia. As the taking of the property is conceded by the defendant, let him proceed to show that he took it lawfully.

The defendant's counsel now read the several acts of the *United States*, "an act making further provision for the payment of the debts of the *United States*," passed *August* 10, 1790, and the "act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the *United States*," &c. passed *August* 4, 1790, and the "act giving effect to the laws of the *United States*, within the State of *Vermont*," passed *March* 2d, 1791, by which the above act, though passed anterior to the admission of the State to the federal compact, are made to have force and effect within it.

Laws of the U. S. vol. 1. p. 247.

Ib. p. 162.

Ib. p. 297.

The plaintiff's counsel now insisted, that the commission of *David Russell*, as collector, ought to be shown.

Sed per Curiam. The collector, a public officer of the *United States*, appointed by the Senate, is to be known as such within this State, without the exhibition of his commission: but the commissions of the deputies of such an officer being issued on his own private appointment, and not by this high and public authority, must be shown.

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The defendant now showed a commission, signed and sealed by *David Russell*, collector of the port of *Alburg*, on Lake *Champlain*, appointing the defendant his deputy, dated *December* 15, 1798.

Plaintiff's counsel. We object to the reading of this commission to the Jury. We consider it as void, not having been regularly issued. The seventh section of the act of the *United States* to provide more effectually for the collection of the duties imposed by law on goods, &c. enacts, "that every collector, naval officer, and surveyor, in cases of occasional and necessary absence, or of sickness, *and not otherwise*, may respectively exercise and perform their several powers, functions, and duties, by deputy duly constituted under their hands and seals respectively, for whom, in the execution of the trust, they shall respectively be answerable." Here the commission does not set forth the existence of any of these fortuitous events on the happening of which the collector was empowered to appoint a deputy.

Laws of the *U. S.* vol. 1. p. 187.

Sed per Curiam. The act of the *United States* does not restrict the collector in the appointment of a deputy to such fortuitous periods, when he, as principal, may be occasionally and necessarily absent or sick, but he may appoint a deputy at any time, "and exercise and perform his powers, functions, and duties, by such deputy, when occasionally and necessarily absent or sick."

The north line of this State presents a land boundary of nearly ninety miles to a foreign dominion. The residence of the collector is established by law at *Alburg*, on Lake *Champlain*, at the western extre-

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mity of this line. The 70th section of the act of the *United States* already read, subjects all dutiable goods to forfeiture brought into the *United States* in contravention of the act, by land carriage. It would be absurd so to construe the seventh section, as that a succession of commissions must issue to a deputy, and be applied to the various and unforeseen violations of the revenue act, which may happen on this extended frontier.

Let the commission be read.

Marsh, for the plaintiff, moved to introduce testimony *viva voce*, to prove what *A. B.*, a witness before the County Court, but now absent, had sworn on the trial below.

Sed per Curiam. Such testimony is inadmissible.

Verdict, not guilty.

Levi House and *Amos Marsh*, for plaintiff.
William C. Harrington and *Thaddeus Rice*, for defendant.

JAMES HAWLEY, Appellee,
against
JOSEPH BEEMAN, Junior, Appellant.

In an action upon a promissory note, the defendant, under the plea of *non assumpsit*, may show that the consideration of the note was a quit-claim deed, executed by the plaintiff to the defendant for certain lands which the plaintiff induced him to purchase, by fraudulently pretending that he had a title to them.

THE plaintiff declared in case upon a promissory note, dated at *Salem*, 7th *July*, 1797, by which defendant, for value received, promised to pay him

466 dols. 50 cts. in eighteen months after date, with interest from the date.

Plea, *non assumpsit*, and issue to the country.

The defendant conceded the signing and delivery of the note, but relied in his defence, that on the day of the date of the note, the plaintiff made and executed to him a quit-claim deed of certain lands in *Fairfield*. That the note contained the consideration of the deed. That at the time of executing the deed and making the note, the plaintiff well knew that he had no claim to the lands, of which the defendant was ignorant, but pretended a title, to practise a fraud on the defendant by which he obtained the note; that the defendant acquired or perfected no title to the lands, and the consideration of the note has therefore failed.

Upon investigation the following facts appeared:

That *Hawley*, senior, father to the plaintiff, some years before the making of the note, claimed these lands in *Fairfield*. That he sent his son the plaintiff, in the year 1792, into that town, with a general letter of attorney, as his agent, to vend the lands. That on the 17th of *July*, 1793, the plaintiff conveyed by deed of that date, a small part of the lands to one *Morrel*, to which deed the defendant was a witness. That on the 13th of *February*, 1795, *Hawley*, senior, conveyed all his lands in *Fairfield* to *Andrew Bradley*, Esquire, and gave notice of the conveyance by letter to his son of that date, which was forwarded to him by *Bradley*.

That the plaintiff, after this, repeatedly affirmed to the defendant and others, that he had a good title to the lands by deed of gift from his father. That the defendant executed the note declared upon for the same sum as in the consideration of the deed, which

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was produced, and appeared to be of even date with and subscribed by the same witnesses who attested the execution of the deed. That upon the defendant's representing to the plaintiff the failure of the title, and requesting him to redeliver his promissory note, the plaintiff addressed several letters to him of the following dates: 1st *August*, 1798, 3d *October* same year, and 4th of *February*, 1801; and in the former letters affirmed that he held a good title to all the lands by deed of gift from his father, and in the latter that he held only part of the lands by such deed.

The question now is, whether these facts can go in evidence to the Jury under the general issue, without notice.

For the defendant it was insisted,

That in general whatever defeats the promise is good evidence on *non assumpsit*. 2 *Stra*. 733.

That therefore infancy may be given in evidence under the general issue. 2 *Lev*. 144.

So, under the general issue, a usurious contract may be given in evidence. The reason is given in the case of *Lord Bernard* v. *Saull*, 2 *Stra*. 198. "for the statute having declared all such contracts as absolutely void, there can be no *assumpsit*."

Vermont Stat. vol. 1. c. x. s. 14. p. 194, 195.

That our statute regulating the conveyances of real estate, and for the prevention of frauds therein, has enacted, that all fraudulent and deceitful deeds, and alienation of any lands, tenements, and hereditaments, shall be utterly void.

For the plaintiff it was urged,

That the failure of the consideration of the deed was a collateral matter, and ought to have been plead-

ed, and cannot be compared with infancy or usury, which go to the gist of the action.

That the mere naked quit-claim deed is not comprehended in the statute read, as it does not *convey* title, but only relinquishes a supposed possible right. That a person holding a choate title in fee may yet know that there are some existing claims, however baseless. That to avoid possible litigation, he may prudently endeavour to quiet such claims, and may procure real enjoyment by the purchase of an imaginary right. He who relinquishes may not consider his claim as valid. It may possibly be so, or it may be doubtful, or totally unsubstantial in his opinion; but such as it is he is willing to part with it upon a consideration agreed upon, which might be measured by the knowledge, the opinion, or the apprehensions, of either or both of the contracting parties. This uncertain right the claimant relinquishes by his quit-claim deed, and the purchaser is willing to take it without any covenant, to refund if the right should prove of no avail. Here is no fraud. Neither would it give a tincture of fraud to the transaction, that he who relinquished the right magnified its sufficiency in maturing the contract.

That the statute read does not comprehend a deed like the present, even if it is considered as fraudulent. The words of the statute are, " that all fraudulent and deceitful deeds, conveyances, and alienations of any lands, tenements and hereditaments, procured, made, or suffered, with intent to avoid any right, debt, or duty, of any person or persons, shall, *as against such person or persons, whose right, debt, or duty, is so intended to be avoided,* his, her, or their heirs or assigns, be utterly void, any false pretensions

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or feigned considerations to the contrary notwithstanding."

The fraudulent deeds here contemplated are such as are made to defeat the rights of third persons, and are declared void as against them only. That if this quit-claim deed should be relied upon to interrupt the title of *Andrew Bradley*, it would be void as against him, but not as between the plaintiff and defendant.

Sed per Curiam. The evidence must be admitted. The subscribing a promissory note is *prima facie* evidence of a consideration; but every thing which goes to prove there was no consideration is good showing to the Jury, under the plea of *non assumpsit.* The distinction between what may be shown under the general issue, and what ought to be pleaded in actions of this nature, seems to be, that that which shows there was no consideration, as infancy or usury, which render the contract void, may be shown under the general issue; but that which acknowledges the consideration, but avoids it by new matter which did not accompany the contract, as accord and satisfaction, tender, &c. must be pleaded, or, what is tantamount by our practice, shown under a notice.

If the Jury shall consider, that the defendant took this quit-claim deed merely to perfect a title, and well understanding, from the plaintiff's representations, the nature of his claim to the lands in *Fairfield*, then the consideration of the note declared upon is good, and they will return a verdict for the plaintiff for the sum in the note, and interest. But if they consider that there has been a fraud practised upon the de-

fendant by the plaintiff in obtaining this note as the consideration for the deed, they will find for the defendant. There can be no doubt, if the facts shown in evidence are not controverted, the defendant may obtain relief in the Court of Chancery. But where a fraud has been practised and fully proved, this Court will be ever ready to render justice in favour of the party injured, without turning him over to the more tedious process of Chancery.

Verdict for defendant, with costs.

William C. Harrington, for plaintiff.
Josias Smith, for defendant.

ISAAC SABIN, Appellee,
against
LEISTER GROSVNER, Appellant.

THE plaintiff declared in general *assumpsit*, in several counts.

First. For that the defendant being indebted to him in 250 dollars, at *Fairfax*, 24th *July*, A. D. 1797, for work and labour done by himself, servants, and horses, assumed, &c.

Secondly. *Quantum meruit*, for personal services.

Thirdly. *Quantum valebat*, for materials for building.

Fourthly. Money laid out and expended. *Alter et idem*, as to sum, time, and place.

Plea, *non assumpsit*, and issue to the Jury.

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The plaintiff stated in his specification, that in the year 1794, he and the defendant agreed to erect a saw-mill at equal proportion of expense, and be held between them in common. That they both assisted in building the mill, but before it was half finished a difficulty arose as to the proportion each had advanced towards the building, which they agreed to snbmit to arbitrators, who, on the 17th of *January*, 1795, awarded *in writing*, that the plaintiff had done more than his proportion of the work, to the amount of 200 dollars, and that he should hold the entire possession of the mill when finished, until he was remunerated in this sum from the profits. That on the next day the plaintiff observed to the defendant, that there was a mistake in the award; that by it he was to have possession of the mill only until he should receive payment for the 200 dollars already expended; but that he understood by the arbitrators, that it was their design to award him possession until he should receive satisfaction for any future expenditures upon the mill which he should be obliged to advance in finishing it, owing to the possible neglects of the defendant. The defendant replied, this is right; and upon the plaintiff's proposing to submit the matter again to the same arbitrators, the defendant said, "There is no occasion. *I here promise you, that if you do more than your half in finishing the mill, I will allow you to have possession of it until you can pay yourself out of the profits.*" The defendant, after this, did nothing towards finishing the mill, but in a few days, to wit, on the 24th of the same *January*, conveyed his moiety to one *Hastings*, who, on the 2d day of the next *February*, sold it to the plaintiff, who soon after finished the mill, and

now brings this suit for moneys advanced, materials, labours, &c. more than his proportion in finishing the mill.

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Harrington, for the defendant. This is a special agreement, and ought to have been specially declared upon. It cannot be given in evidence under either of the special counts in the declaration.

It is laid down in *Espinasse's Digest*, that it was formerly held, that where there had been a special agreement, plaintiff ought to declare on it; for he should not be allowed to give it in evidence on a general *indebitatus assumpsit;* and there is nothing appears why it is not the practice now, excepting a marginal query by the learned author. Certainly the case of *Knight* v. *Cox*, decided by *Pemberton*, Chief Justice, is in support of the practice, and the same case is cited in *Buller's Nisi Prius*, as illustrative of it. Certainly this ancient rule of law will be highly beneficial in modern practice, and there cannot be a stronger case than the present to show it.

Esp. Dig. vol. 1. p. 140.

Vide *Riley's* edit. p. 153.

The plaintiff has declared in several general counts of implied *assumpsit*, and offers by his specification to show in evidence, that he and the defendant contracted to build a mill, which was to be common property, and to be erected at equal expense; that he had advanced 200 dollars in labour, &c. before the structure was half completed; that a dispute arose, which was left to arbitrators, who awarded that sum to him for surplus expenditure, and by a mistake in the written award gave him entire possession of the mill until he should remunerate himself *in this sum* from the profits of it, when the intention of the arbitrators was to give him possession of the mill until

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by this parol demurrer to the evidence proferted by it.

Curia. As the Court are at present impressed, the special promise set forth in the specification cannot go to the Jury in support of either of the counts in the declaration; but we are willing to hear arguments for the plaintiff *instanter*, or let a verdict be taken for the defendant, subject to the opinion of the Court upon the rejection of the evidence; or, as the cause is open to review, upon the review the subject may be more deliberately argued and considered than this late hour of the term will admit. However, the plaintiff has his election.

The plaintiff suffered a verdict to be returned against him, and the cause was not reviewed.

Levi House and *Amos Marsh*, for plaintiff.

William C. Harrington and *Thaddeus Rice*, for defendant.

SILAS HATHAWAY, Appellee,
against
NATHAN SMITH, Appellant.

A servant is not accountable for an injury done to his master's beast through his mishap, if he is engaged in performing any of the duties for which he was hired, and the animal is commonly used in such services, and the servant has exercised all the discretion in its use which common prudence requires, although he can show no especial order by the master to use the particular animal on such occasion.

TRESPASS against a hired servant for abusing a horse.

Plea, not guilty. Trial *per pais.*

It appeared in evidence, That the defendant had hired himself to the plaintiff to work as a labourer

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upon his farm. That on the 20th of *November*, 1800, the plaintiff sent the defendant to a smith's shop to bring home an ox-yoke. That the defendant rode the mare, and in going upon this errand she fell, which occasioned the loss of her foal.

In charge to the Jury, the Court laid it down as law, that a servant is not accountable for an injury done to his master's beast through his mishap, if he is engaged in performing any of the duties for which he was hired, and the animal is commonly used in such services, and the servant has exercised all the discretion in its use which common prudence requires, although he can show no especial order by the master to use the particular animal on such occasion.

Verdict for defendant.

William C. Harrington and *Thaddeus Rice*, for defendant.

Levi House and *Eleazer Keys*, for plaintiff.

STATE *against* S. L.

A person may be holden to answer to an information for receiving stolen goods, knowing them to have been stolen *contra formam statuti*, though the principal has not been convicted.

INFORMATION by the State Attorney, for that the defendant, on the 22d of *April*, 1802, *vi et armis* stole, took, and carried away from the dwelling-house of *Alfred Williams*, in *St. Albans*, 106 muskrat skins, of the value of 40 dollars, and 6 racoon skins, of the value of 9 dollars, the proper goods and chattels of the said *Williams*, *contra formam statuti*.

Second count. That on the same day he received the same property from one *John Burbank*, knowing

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the same to have been stolen, against the form, force, and effect of the statute in such case made and provided.

The defendant pleaded not guilty, and put himself on the country for trial.

The State Attorney, after full proof of the loss of the property by *Williams*, offered to go into evidence in support of the second count.

Marsh, for the defendant, objected, and insisted, that the defendant could not be convicted on the count for receiving stolen goods, until after the conviction of *Burbank*, the principal; and therefore all evidence in support of this count was impertinent.

The point was argued by *House* for the State, and by *Marsh* for the defendant.

After a recess, the Court delivered their opinion.

This point, though formerly much altercated in *England*, seems now to be settled by the decisions under a succession of statutes, a recurrence to which is important, as well to show upon what principles and how the point has been decided in the parent country, as to show why our own statute, upon which the information is founded, cannot be affected by the *English* statutes or decisions.

At common law, the receivers of stolen goods, knowing them to have been stolen, were not considered as accessaries; to constitute them such it was necessary that they should have actually concealed the felon, or for a reward favoured his escape.

But by the statute of the 3d of *William & Mary*, cap. 9. sec. 4. "If any person or persons shall buy or receive any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he or they shall be taken and deemed an accessary or accessaries to such felony after the fact, and shall incur the same punishment as an accessary, &c. after the felony committed."

Here the receiver of stolen goods, knowing them to be stolen, is made an *accessary*, and the offence considered *a felony*.

In the judicial decisions under this statute, the receiver could not be punished until the conviction of the principal. On this account the receiver, who was frequently the patron and employer of the thief, escaped with impunity, so long as he could keep the principal from trial. To remedy this, the statute of 1 *Anne*, st. 2. c. 9. s. 2. passed eleven years after, enacted, "that it shall and may be lawful to prosecute and punish every such person or persons, buying or receiving any stolen goods, knowing the same to be stolen, as for *a misdemeanor*, to be punished by fine and imprisonment, though the principal felon be not before convicted of the said felony, which shall exempt the offender from being punished as an accessary, if the principal shall be afterwards convicted."

Another statute, passed in the 5th of the same reign, in the 5th section, enacts, "that if any person or persons shall receive or buy any goods or chattels that shall be *feloniously* taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour, or conceal any burglars, felons, or thieves, knowing them to be so, he or they shall be

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taken as accessary or accessaries to the said *felony or felonies*, and being legally convicted by the testimony of one or more credible witnesses, shall suffer death as a felon convict."

Subsequent immediately to this, it is provided, "that if any such principal felon *cannot be taken* so as to be prosecuted and convicted for any such offence, yet nevertheless it shall and may be lawful to prosecute and punish every such person and persons buying or receiving any goods stolen by any such principal felon, knowing the same to be stolen, as for a misdemeanor to be punished by fine and imprisonment, or other such corporal punishment as the Court shall think fit, although the principal felon be not before convicted of the said felony; which shall exempt the offender from being punished as accessary, if such principal felon shall be afterwards taken and convicted." 5 *Anne*, c. 31. s. 5. and 6.

In the construction and application of these statutes to existing cases, new impediments appeared in the prosecution of receivers of stolen goods.

In the first place it was observed, that the statute of *William & Mary* had made the offence a *felony*, whilst the statute of 1 *Anne* had considered it as a misdemeanor, and punished it as such by fine and imprisonment, and exempted the offender in case the principal felon should afterwards be convicted; and the statute of the 5th of *Anne* still considered the offence as a misdemeanor, but punished it corporally, and contemplated cases where the *principal cannot be taken.*

That if the prosecution was brought on the statute of *William & Mary*, the receiver could not be tried before conviction of the principal.

If on the 1st of *Anne*, the offender could only be punished by fine and imprisonment.

If on the 5th of *Anne*, it must be in cases only where the principal could not be taken. This expression implied, that there must be an endeavour to take, and therefore there must be some attempt, or at least some diligence used to apprehend the principal on the part of the prosecutor, before the receiver could be brought to trial; and it was insisted, that it should be averred in the indictment against the receiver, that the principal could not be taken. In the case of *The King* v. *Pollard & Taylor*, this latter point was made. 1 d. *Raym.* vol. 2. p. 1370.

The defendants were severally indicted for receiving goods stolen by one *Foster*, knowing them to be stolen, as for a misdemeanor, upon the 5th of *Anne*. The defendants were found guilty, and motion in arrest; for that by the statute of *William & Mary* this offence was made felony, but by a subsequent statute, 5th of *Anne*, the receiver may be tried for a misdemeanor, if the principal cannot be taken; but if he could be taken, the receiver could not be prosecuted for a misdemeanor, and therefore it is necessary, in such an indictment as this, to aver that the principal felon could not be taken. But the Judges held, upon consideration of the statutes, that the prosecutor had his election to prosecute either for felony or misdemeanor, and though there had been several indictments for such offences, yet none have had any such averment as is insisted on to be necessary by the counsel for the defendant, and judgment was given for the prosecutor; but this decision, as to the election of the prosecutor, was afterwards doubted.

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Another difficulty arose, in that the statute of *William & Mary*, and the several statutes of *Anne*, had not distinguished between grand and petit larceny.

The statute of *William & Mary* had considered the offence of receiving stolen goods, knowing them to have been stolen, as a felony, and the offender as an accessary; but if the principal thief had only committed petit larceny, this offence was not a felony, and in such case there could be no accessaries after the fact, whilst the several statutes of *Anne* had not made this distinction in case of those receivers who might be exempted from punishment as accessary, if the principal felon should afterwards be convicted.

To remedy these difficulties, in the reign of his present majesty of *England*, the parliament once more legislated upon this subject; and by the stat. 22 *Geo.* III. c. 58. it is enacted, " that in all cases whatsoever, where any goods or chattels (except lead, iron, copper, brass, bell-metal, and solder, the receiving of which had been provided for by 29 *Geo.* II.) shall have been feloniously taken or stolen, whether the offence of the principal shall amount to grand larceny, or some greater offence, or to petit larceny only, (except where the person or persons actually committing the felony shall have been already convicted of grand larceny, or of some greater offence,) every person who shall buy or receive any such goods or chattels, knowing the same to have been so taken or stolen, shall be deemed guilty of and may be prosecuted for a misdemeanor, and shall be punished by fine, imprisonment, or whipping, as the Court of Quarter Sessions, who are hereby empowered to try

such offender, or as any other Court before whom he, &c. shall be tried, shall think fit, although the principal felon or felons be not before convicted of the said felony, and whether he, she, or they is or are amenable to justice or not; and in cases where the felony actually committed shall amount to grand larceny, or to some greater offence, and when the person or persons actually committing such felony shall not be before convicted, such offender or offenders shall be exempted from being punished as accessary or accessaries, if such principal felon or felons shall be afterwards convicted."

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The law may therefore be considered as now settled in *England*,

First. That a receiver of goods or chattels, knowing them to have been stolen, may be convicted, although the principal be not convicted, whether he be amenable to justice or not, and this in case of grand or petit larceny.

Secondly. That when the offence in the principal amounts to grand larceny, and when the principal shall not be before convicted, the receiver shall be exempt from punishment as accessary, if the principal be afterwards convicted.

Thirdly. That when the offence in the principal amounts to petit larceny only, the receiver may be tried, convicted, and punished corporally for a misdemeanor before the conviction of the principal, whether the principal be amenable to justice or not; but he shall not be exempted from trial and punishment, if the principal shall be convicted.

The Legislature of this State, appearing to have been well aware of the various and complicated embarrassments which impeded the *British* Parliament

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in maturing and perfecting this part of their criminal code, have so worded the statute upon which the second count in the information is founded, that our Courts of Justice can have none of those difficulties to encounter which so long exercised the ingenuity of counsel, and displayed the wisdom of *English* Judges.

Vermont Stat. vol. 1. p. 353. c. 33. s. 2.

The statute reads, "that if any person shall buy or receive any goods, chattels, or other hings taken or stolen from any other person, knowing the same to be stolen, or shall receive or harbour any thief or thieves, knowing him, her, or them to be such, the person so offending, on conviction thereof, shall be liable to the same punishment as is prescribed in the preceding section."

In the first place it is to be observed, that here is no distinction between fraud and petit larceny; and none should be made, because our law does not acknowledge the *English* technical distinction between them, leaving the punishment of theft to be increased or ameliorated by the magistrates to a certain amount, on conviction, as the greater or less aggravation of the offence may require.

Secondly. Our statute does not secure to the receiver of stolen goods any exemption from punishment on conviction of the principal.

Thirdly. The Legislature, to avoid the difficulties which occurred in the construction and application of the *English* statutes, have omitted the term *feloniously*. In a strict and technical sense, theft is not with us a felony.

Fourthly. Upon the same principle they have omitted the term *accessary*, though, in other respects, our statute is transcribed from the 5th of *Anne*.

Fifthly. And also, the distinction betwixt the offence, considered as a felony or a misdemeanor.

And sixthly. Our statute does not even indirectly contemplate the conviction of the principal as having any effect upon the case of the receiver, as the *English* statutes do.

The Court consider the statute under consideration as made in aid of the moral law; that it well defines an offence, which certainly may exist, and may be prosecuted and proved without the conviction of the principal.

In support of the second count in the information, it is incumbent on the public prosecutor to show,

First. That a theft has been committed by some person.

Secondly. That the defendant knew of the theft.

Thirdly. That the defendant corruptly received the goods stolen. And,

Fourthly, which is the all-essential point, and might seem to include all the others, That he received the goods, knowing them to have been stolen. On showing this he will bring the defendant within the purview of the statute.

The Court have been more particular on this subject than might otherwise seem necessary, were it not that it is the first time this point in defence has been submitted to them.

It is for the Legislature to make laws, and this Court to construe them. If we construe them incorrectly, they can correct our decisions by future statutes. But when a statute offence is not merely *malum prohibitum*, but is against the common principles of morality, and the general sense of the community, the Court will ever give effect to such sta-

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tute, and not unnecessarily create embarrassments in the administration of the laws, which may constantly require legislative aid to remove; for whoever observes the history of jurisprudence, will perceive, that such has been too often the case, to the obstruction of the due dispensation of justice.

If, however, a conviction should follow this interlocutory opinion, the prisoner may move in arrest of judgment for the improper admission of evidence in support of the second count in the information, and the Court will, on further argument, yield all that attention to the cause which the importance of the subject, especially as relative to him, may require.

Let the evidence be admitted.

The State Attorney failing to make out the *scienter* in the defendant, the Jury returned a verdict of not guilty.

Levi House, for the State.
Amos Marsh, or defendant.

SWAN, Treasurer of the State,
against
JOHN COLFAX et al.

In an action at the suit of the State Treasurer, the State Attorney cannot tax costs for the plaintiff's travel.

THE plaintiff brought his action upon a promissory note made to him in his official capacity, and had judgment.

The State Attorney moved to tax costs for the

travel of the plaintiff from *Woodstock*, the place of his residence.

Sed per Curiam. It has never been the practice to tax costs for the travel of the State Treasurer.

Levi House, for plaintiff.
Bates Turner, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JANUARY TERM, A. D. 1803.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

FELIX AUGER, in the right of ESTHER, his wife, Appellant,
against
WILLIS TAYLOR and JOSEPH BRADLEY, Administrators on the Estate of CALEB TAYLOR, Appellees.

If a person die intestate, unmarried, and without issue, leaving surviving brethren and sisters, his or her personal estate must be distributed by the administrators under a decree of the Probate, so that the brothers shall have equal portions, and the sisters equal portions, but that each male portion shall be *double* the amount of each female portion.

APPEAL from a decree of the Judge of Probate of *Chittenden* District, directing the division of personal estate.

Auger v. Taylor and Bradley.

State of Vermont.

Chittenden District, ss. Be it remembered, that at a Probate Court, begun and holden at *Williston*, on the seventh day of *April*, in the year of our Lord 1801, and continued from day to day by adjournments until the 11th day of said *April*, by the honourable *Solomon Miller*, Esquire, Judge of said Court, the following sentence, order, or decree, was made, to wit:

State of Vermont.

Chittenden District, ss. The honourable *Solomon Miller*, Judge of the Probate of Wills, &c. within and for said District,

To *Willis Taylor* and *Joseph Bradley*, administrators on the estate of *Caleb Taylor*, late of *Williston*, in said District, deceased, intestate.

Whereas it hath been made to appear to me, that the demands against said estate have been legally settled, and the real estate been disposed of, agreeably to an order or decree of this Court, and such debts and charges as the law directs having been subducted, there appears to be in your hands a residue and remainder of nine hundred and seventy-five dollars and twenty cents;

You are therefore hereby ordered and directed to pay and distribute the same to and among the heirs of said estate, giving to the male heirs double the sum you do to the female heirs, as follows, to wit: to *Eldad Taylor*, 121 dols. 90 cts.; to *Willis Taylor*, *John Taylor*, *Ezra Taylor*, and *Gates Taylor*, the same sum each, they being brothers to the deceased; and to the widow *Esther Taylor*, the sum of 60 dols 95 cts. she being mother to the deceased; to *Rhoda*,

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wife of *Daniel Shaw*, *Esther*, *wife of Felix Auger*, *Naomi*, wife of *Joseph Bradley*, *Keziah*, wife of *John Jones*, and *Betsey*, wife of *John Munson*, the same sum each, they being sisters to the deceased; and make due return as soon as may be. Dated in the Registry of Probate the 11th day of *April*, 1801.

Attest, *Isaac M'Niele*, Register.

From this decree, *Felix Auger*, in right of his wife *Esther*, appealed, and entered his appeal *January* term, A. D. 1802, and at the same term filed the following declaration:

Felix Augur, in right of his wife *Esther*, Appellant, v. The Administrators of *Caleb Taylor*. } Supreme Court of Judicature, *Chittenden* County, A. D. 1802.

The said *Felix Auger*, and *Esther* his wife, in the Court here, by *William C. Harrington*, their attorney, declare and say, that *Caleb Taylor*, late of *Williston*, in the County of *Chittenden*, deceased, intestate, was of full age and unmarried at the time of his decease; that the said *Caleb Taylor* died without issue, and had, at the time of his decease, a mother, five brethren, and five sisters, who have survived the said *Caleb Taylor*, and that the said *Caleb* died intestate, seised and possessed of real and personal estate, more than sufficient to answer all the demands against the said estate, to the amount of nine hundred seventy-five dollars and twenty cents, to be divided into equal shares, to and among the heirs of the said *Caleb Taylor*, according to the statute in such case made and provided; but by a decree of the

Judge of Probate of *Chittenden* District, made at a Probate Court in his said District, on the 11th day of *April*, A. D. 1801, the said personal estate of the said *Caleb Taylor*, deceased, was by said decree ordered to be distributed by the said administrators to and among the said heirs, in such manner as that the portion of the said *Caleb Taylor's* brothers should be double the portions of the said *Caleb Taylor's* mother and sisters; whereas, by the statute in such case made and provided, the said personal estate of the said deceased hath descended, and ought to be distributed in equal shares to the said collateral heirs of the said *Caleb Taylor*, deceased, both *male and female*. And the said *Felix Auger* and *Esther* his wife, the said *Esther* being one of the sisters to the said *Caleb Taylor*, deceased, having appealed from said order or decree of the said Judge of Probate to this Honourable Court, now pray the Court here to order and direct, that an equal share of the said personal estate be set off by the administrators on the said estate to the said *Felix Auger* and *Esther* his wife, in the right of the said *Esther*, according to the statute in such case made and provided.

By agreement of the parties, the cause was submitted to the Court without argument, and at this term the Court rendered judgment.

Opinion of the Court.

Curia. It appears from the files, that *Caleb Taylor* died of full age, unmarried, without issue, and intestate, leaving his mother *Esther Taylor*, five brothers, to wit, *Eldad*, *Willis*, *Ezra*, *John*, and *Horatio*

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Gates; and five sisters, to wit, *Rhoda*, married to *John Shaw*, *Naomi* to *Joseph Bradley*, *Keziah* to *John Jones*, *Betsey* to *John Munson*, and *Esther* to the appellant. A residue of the personal estate remains to be divided, and the question is, what proportion each sister shall take. This must be decided by a sound construction of the act for the probate of wills and settlement of estates.

Vermont Stat. vol. 1. p. 353.

The 31st section of this act enacts, "that when any person shall die possessed of any goods or personal estate, not bequeathed, the same shall be distributed in the manner real estates descend by this act."

This leads to the descent of real estates, as is provided for by the 27th section of the same act.

"That when any person shall die seised of any lands, tenements, or hereditaments, within this State, not by him devised, the same shall descend to his children, or their legal representatives if any of the children be dead, in such manner that the portions of all the male children shall be equal, and the portions of all the female children shall be equal, and the portion of a male child shall be double the portion of a female child; and if any child shall have been advanced by way of settlement, or otherwise, by the intestate in his life-time, such advancement shall be reckoned to the share of such child, either in whole or in part, according to the value thereof at the time of such advancement. And if the intestate shall have no child or children at the time of his decease, such estate shall descend equally to the next of kin, in equal degree, and those who represent them."

Upon the last clause of this section, it appears, the appellant founds his claim in the right of his wife, to

a portion of the personal estate of the intestate, equal in amount to the portion of either of his wife's brothers.

The Court consider that the probate decree has pursued the true intent of the statute. The misapprehension of its meaning seems to have arisen from an erroneous application of the word *equally*. When the statute declares that "such estate shall descend *equally* to the next of kin," the word is not used in its *verbal* sense, as it is in the former part of the section, where it is said that "the portions of all the male children shall be equal," where it intends that they shall be on a level, or to the same amount; but the term equally, as an adverb, is used in one of its adverbial senses, and intends, in like manner, or in the same manner as has been before provided.

This construction is put beyond doubt by a recurrence to the third proviso under this section: "that if any child of an intestate die before he or she shall arrive at full age and unmarried, such deceased child's portion or share shall descend to the surviving brothers and sisters, and such as legally represent them, in proportion as is above directed in this act: but if such child die after having arrived at full age, unmarried and intestate, in the life-time of the mother, she shall inherit *equally with every sister.*"

In this proviso there is a reference to the 27th section for the proportion which shall be distributed to the surviving brothers and sisters; and further, in case the child of the intestate, after arriving at full age, died unmarried, and also intestate, the mother shall inherit equally *with every sister:* not with all the brothers and sisters; not *equally* with the next of kin,

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but with every sister. Whence this distinction, if the brothers and sisters were to have equal portions?

The Court consider, in cases like this now submitted, that if a person die intestate, unmarried, and without issue, and leave surviving brethren and sisters, his or her personal estate must be distributed by the administrator or administrators, under a decree of the probate, so that the brothers shall have equal portions and the sisters equal portions, but that each male portion shall be double the amount of each female portion.

It does not appear from the record, whether the personal estate in contest was acquired by *Caleb* the intestate after he became of age, or was part of his paternal portion, as the Judge of Probate in his decree has given an equal proportion of it to the mother with the sisters. The presumption is that the latter is the case; and being so, the decree is correct in ordering the mother an equal portion with the sisters. But as this is a point not submitted, the Court will not enlarge.

The decree of the Judge of Probate is affirmed.

William C. Harrington, for the appellant.

DANIEL CHIPMAN, Esquire,
against
TIMOTHY PEARL, Esquire.

When a person not a freeholder, or being a freeholder not resident within this State, applies to any person having authority to issue writs on any process whatever, to attach any person or persons to answer before any Court in this State, and offers suretyfor the prosecution of his writ to effect, the sufficiency of such surety must be determined solely by the person issuing such writ, and cannot be afterwards questioned, under a plea of abatement.

IN ERROR. The plaintiff brought this writ to reverse a judgment of *Chittenden* County Court, rendered *March* term, 1802.

Oyer of the record craved, *et in nullo est erratum* pleaded.

It appeared by inspection of the record, that the plaintiff had purchased out a writ of attachment against the defendant, returnable before *Joseph Phelps*, Esquire, Justice of the Peace. At the issuing of the writ, the magistrate made the following minute thereon, and signed it with his official signature:

George Robinson recognised to the defendant in the sum of ten dollars for costs of prosecution in due form of law, before me.

The cause was carried by appeal to the County Court, where the defendant filed the following plea:

And now the defendant comes, &c. when, &c. where, &c. and pleads and prays, that the plaintiff's writ may be abated and quashed, and that the same may be dismissed and no further proceedings had thereon, because he says, that the said writ was a writ of attachment, and that *George Robinson*, the person who recognised for the costs which might arise in the prosecution of the same, is not a freeholder within this State, agreeably to the statute in such case made and provided, all which he is ready to verify; wherefore the defendant prays judgment as aforesaid, and that legal costs may be adjudged to him. To this plea the plaintiff demurred, and the

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County Court rendered judgment for the defendant, and quashed the writ.

And this is the errror assigned.

Vermont Stat. vol. 1. p. 71.

So that the question rests on the 44th section of the judiciary act, "that when any person or persons, not being freeholders in this State, or being freeholders shall reside without this State, shall apply to any person having authority to issue writs for any process whatever, to summon or attach any person or persons to answer before any court within this State, there shall be sufficient surety given to the defendant or defendants, by way of recognisance, *to the satisfaction of the authority signing such process*, before the signing thereof, that the plaintiff or plaintiffs shall prosecute his, her, or their writ to effect, and shall answer all damages, if a judgment shall be rendered against him, her, or them; a minute of which recognisance, with the name of the surety or sureties, and the sum in which they are bound, shall be made upon the said writ at the time of signing thereof, and signed by such authority; and if any writ be otherwise issued, the same on motion shall be abated."

The Court are of opinion, that when a person not a freeholder, or being a freeholder not resident within this State, applies to any person having authority to issue writs for any process whatever, to attach any person or persons to answer before any Court in this State, and offers surety for prosecution of his writ to effect, the sufficiency of such security must be determined solely by the person issuing such writ, and cannot be afterwards questioned under a plea in abatement to such writ.

That if the defendant doubts the responsibility of the recognisor, or the sufficiency of the sum in which he is recognised, he may move the Court before whom the process is returned, or any other Court before whom the action may be pending, for an augmentation of the sum, or a more responsible surety; and the Court in their discretion may order bail to be put in sufficient for these purposes, as is provided in the next succeeding section to the act.

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This construction of the statute is not novel. It was so given under the presidency of Chief Justice *Woodbridge*, in a stronger case, that of *John Adams* against *Jacob Davis*, decided in this County, *January* term, A. D. 1800.

Judgment that there is error in the record, and that judgment of the County Court be reversed.

Vide *ante*, vol. 1. p. 3.

Elnathan Keyes, for plaintiff.
William C. Harrington, for defendant.

Ex parte Bryant.

AT the last term, the Grand Jury presented an indictment against *William Bryant, billa vera.* A *capias* issued, and he was apprehended and gave bail, with sureties for his personal appearance at this term.

It is a sufficient return to a *habeas corpus ad prosequendum*, directed to a sheriff as chief keeper of the gaol, to bring his prisoner into Court, "that the prisoner is sick and languishing, and cannot be removed without endangering his life;" but such return must in future be accompanied with affidavits of visiting physicians.

Ex parte Bryant.

On motion of the State Attorney, the crier was proceeding to call the principal; when

Keyes, for the sureties, suggested to the Court, that *Bryant* was a prisoner for debt in *Woodstock* gaol, *Windsor* County, and he moved for a writ of *habeas corpus* to bring him into Court for trial in discharge of the recognisance.

The Court ordered a writ of *habeas corpus ad prosequendum* to issue, directed to the sheriff of *Windsor* County, as keeper in chief of that prison.

The sheriff of *Windsor* County returned, that the prisoner was in his custody, but sick and languishing, so that he could not be removed without endangering his life, and therefore prayed to be in mercy for not obeying the writ.

The State Attorney objected to the validity of the return, and moved for a rule upon the sheriff for a contempt.

Sed per Curiam. The return is satisfactory to the Court. If the prisoner be dangerously sick, it is a sufficient reason why he should not have been removed; but a return of this nature, it is expected, will in future be accompanied with affidavits of physicians, that the Court may judge whether the bodily indisposition of the prisoner be so great as to justify the sheriff in his disobedience to the writ.

The State Attorney now renewed his motion to estreat the bonds.

Sed per Curiam. Let the cause be continued until the next term; and in the interim the bail may have a new writ to bring the prisoner into Court.

Ex parte Bryant.

William C. Harrington, for the State.
Elnathan Keyes, for the sureties.

ROGER ENOS, Junior,
against
BENJAMIN BOARDMAN.

Amos Marsh, for plaintiff.
Elnathan Keyes, for defendant.

IN ERROR. In this cause judgment was rendered for the defendant, and the plaintiff moved to enter a *review*, and had leave, as it appeared that in some of the Counties it had been heretofore the practice; but the Court then suggested a doubt of the propriety of the practice, and have since, after consultation, refused the entry of a review upon a judgment rendered upon a writ of error.

The Court will not in future allow a review on a judgment upon a writ of error, though it had been formerly practised, and was permitted in this case.

Note. The Court have considered, that the right of review is derived entirely from, and must be regulated in extent by the statute.

Section 3. of the judiciary act provides, that in all civil causes, originally commenced before the County Court, either party shall have liberty to appeal from the judgment of said Court unto the first stated session of the Supreme Court of Judicature then next

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to be holden within and for the same County; or once and no more, to review his cause at the next stated session of the same County Court, and either party shall have liberty to review his cause at the next stated or adjourned session of the Supreme Court in the same County.

Here the only cases where the right of review is given by the statute in the Supreme Court, are in such civil causes as were originally commenced before the County Court. This Court having original jurisdiction of writs of error, they are not within the purview of the statute....*Reporter.*

STATE *against* JOHN SMITH.

On an indictment for horse-stealing, whatever may be the circumstances of the taking, it must be left to the Jury to determine whether taken with a felonious or furtive intent.

INDICTMENT for horse-stealing.

The defendant was indicted, for that at *Charlotte*, in this County, on the 10th day of *August*, A. D. 1802, he feloniously took, stole, and carried away a certain bay mare of the value of 130 dollars, of the proper goods and chattels, and from the possession of *Nathaniel Newell, contra formam statuti.*

He was arraigned, pleaded not guilty, and put himself on the country for trial.

On the trial the following facts appeared in evidence:

That the prisoner had occasionally lived with *Newell* as a hired servant at several times for several years, and once for three months in succession. That he let himself to *Newell* as a day labourer during part of the hay season, and had commenced his la-

bours one week before the taking of the mare. That on the 8th of *August*, *Newell* went a short journey, and during his absence the prisoner applied to his son to borrow the mare to ride to *Colchester*, about 20 miles. The son observed to him, that his father would be unwilling to have the mare rode, as she was lame. The prisoner replied, " I asked your father to let me ride her to *Colchester*, and he told me he could not, as she was lame; but soon after he looked at her hoof, and observed, that it would do her good to ride her moderately, and that I might have her." The son then said, " If you will take her, it must be at your own risk: remember, I forbid you." The prisoner then rode the mare away, and was not seen again until the first of *January* following; when he was observed passing through *St. Albans* on his return from the Province of *Lower Canada*, and accosted by a witness who knew the circumstances. When charged by the witness with stealing, he observed, " I know I have done wrong in going off with the mare and selling her; but I did not intend to steal her, for I am now going to *Charlotte* to see Capt. *Newell*, and settle the business."

On the second of *January*, the prisoner came to *Burlington*, and went to Mr. *Russell's* house, who was concerned in trade with *Newell*, and inquired for Capt. *Newell's* clerk. *Russell* knowing the prisoner, told him to go into the house and he would send the clerk to him, which he did, and then went to a magistrate for a warrant to apprehend him. When the clerk came in, who was *Newell's* son, who had forbidden him to take the mare, the prisoner appeared much confused; but on being interrogated by the clerk, he acknowledged that the whole account he

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had given to him respecting his father's looking at the mare's hoof, and giving him liberty to ride her to *Colchester*, was a mere fabrication in order to get possession of the mare; that he rode the mare to *Canada*, and *swopped* her at *Chateaugey* for another mare, and gave the saddle to boot; but that he was now going to see his father, and would settle the business; that he had a horse with him worth 80 dollars, which he intended to let him have.

On the prisoner's being apprehended and carried before the Court of Inquiry, *Newell* appeared, and accused the prisoner of stealing his mare; and observed, "*Smith*, you lied to my son; you know I never gave you liberty to ride the mare to *Colchester*." The prisoner replied, "That is very true; but I was obliged to tell that story in order to get the mare. I have done very wrong; but I was on my way to *Charlotte* to settle the business with you. I certainly never meant to steal the mare."

The question made was, whether these facts show a felonious taking of the mare by the prisoner.

It was insisted by

Hitchcock, in the defence, that the felonious intent must exist and accompany the act of taking; that if there were no such intent at that time, though afterwards the captor convert the property taken, it is not theft.

That the prisoner was servant to the prosecutor, and as such, if he took the mare without the master's leave, or against his express directions, if he voluntarily returned her again, it was not theft, but trespass; and that the showing a willingness, and offering

to pay amply for the property taken, amounted to the same thing.

That Judge *Blackstone* lays it down, "that the ordinary discovery of a felonious intent is where the party doth it clandestinely, *or being charged with the fact, denies it. Bl. Com.* vol. 4. p. 332. That this did not appear to be the fact in the present case, for that the prisoner always owned the taking, and acknowledged that he did wrong, that is, that he had committed a trespass, always protesting that he never intended to steal, and was willing, and even was on his way, to make restitution when he was apprehended.

That if there were any thing criminal in the transaction, it was not the crime charged in the indictment; it was merely obtaining property by false pretences, and the indictment should have been founded on the 29th section of the act for the punishment of certain capital and other high crimes and misdemeanors. *Vermont* Stat. vol. 1. p. 333.

The State Attorney insisted, that the fraudulently and deceitfully obtaining property with a design to eloign it, is such a felonious taking as will constitute theft. He cited *Rex* v. *Charlewood*, 1 *Leach*, 456. *Rex* v. *Aikles*, ib. 330. and *Hawkins's Pleas of the Crown*, vol. 2. p. 134.

That the prisoner took the property clandestinely, in the absence and without the privity of the owner. Here was no contract, no delivery, either of property or possession, and therefore the question so much agitated in *England* between larceny and swindling could not arise.

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That the prisoner's being apprehended on his way to attempt a compromise with the owner, could not affect the public prosecution for the crime. He went to compromise all that it was in the owner's power to accommodate, which was the civil injury he had sustained, but the owner could not compound a felony.

The Court, in their charge to the Jury, after stating the evidence, minutely observed,

That in order to find a verdict, they must search for the prisoner's intent in taking the mare.

That if they were convinced beyond any rational doubt, that the prisoner took the mare with a fraudulent design to convert her to his own use, they must find him guilty.

That the law upon this subject had been variously and perhaps too nicely considered, insomuch that the learned Judge *Hale* had observed, in a systematic treatise, " that the circumstances evidencing a *felonious intent*, are so various that it is impossible to prescribe them."

Hale's P. C. 509.

That although cases may arise from the wicked ingenuity of men, who fraudulently deprive others of their property, which may not be readily classed under precedents, or placed within the scope of known and established principles, which might embarrass even professional men; yet the sound and unsophisticated reason of jurors would readily enable them to draw a just conclusion of the prisoner's guilt or innocence from an impartial and attentive consideration of the facts testified.

The Jury would therefore, from a view of the facts, determine whether the prisoner, at the time of his

taking the mare, intended or did not intend to steal her; and as they found this, return their verdict accordingly.

As to what had been said in the prisoner's defence, that this indictment should have been laid upon the 29th section of the act for the punishment of certain capital and other high crimes and misdemeanors, as obtaining property by false pretences, the Court would observe, that the statute referred to seemed to contemplate cases where money, goods, or chattels are obtained by *contract* on false pretences, or where the property is parted with by consent fraudulently obtained; but in the present case there is neither contract or consent. *Newell* the owner never gave any, and his son forbade the prisoner to take the mare.

The Jury found the defendant guilty.

William C. Harrington, for the State.
Samuel Hitchcock, for the defendant.

STATE *against* AMOS CLARK.

INDICTMENT for perjury.

The indictment charged the defendant with wilful and corrupt perjury, and stated in substance, that at a Justice's Court, holden before Mr. Justice *Cobb*, at ——, to wit, on the 11th day of *August*, A. D. 1801, the prisoner appeared as a witness in a cause wherein *Joel Titus*, as plaintiff, had impleaded one *Hubbel*, in an action upon book account. That it be-

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came material to the issue, whether a certain sum charged in the plaintiff's day-book, had been endorsed upon a certain promissory note, which *Hubbel* held against *Titus*. That the prisoner, well knowing that such endorsement had been made, after an oath in the usual form had been administered to him by competent authority, testified that the endorsement was not made; and so the Jurors on the oath say, that the said *Amos Clark* has committed wilful and corrupt perjury, *contra formam statuti*.

On arraignment the prisoner pleaded not guilty, and put himself on the country for trial.

The Attorney for the State, in support of the indictment, offered to adduce *Joel Titus* as a witness.

Marsh, for the prisoner, objected. He acknowledged, that the witness had no interest in the event of the cause, but insisted, that a person cannot be admitted to testify, if he considers himself to be interested, though he should not in fact be interested; for the bias in his mind to falsify facts, which is the sole reason for the rejection of an interested witness, would in such case be the same as if he were really interested, and greater than if he were really interested, and considered himself not to be so; and cited *Fortheringham* v. *Greenwood*, 1 *Stra.* 129.

If a witness considers himself interested when he is not, on being informed by the Court that he is not interested, he shall be sworn and testify, and the Jury shall allow for any possible bias in his mind in weighing his credibility.

Sed per Curiam. If the witness has considered himself to be interested, and any undue bias in his mind has been created from this consideration, it is to be presumed that it will be removed upon his being informed by the Court that he is not interest-

ed. If, however, he has unhappily contracted any prejudice from a supposed interest, too obstinate to be removed by this suggestion of the Court, the Jury will consider it in forming an opinion of his credibility.

Let the oath be administered to him.

Upon the State Attorney producing the record of the Justice's Court, it appeared that the Court was holden on the 11th of *September*, 1801, and not on the 11th of *August*, as allegated in the indictment.

The prisoner's counsel objected to the record's being read to the Jury, on account of this variance.

Marsh. That some particular day on which an offence was committed is necessary to be allegated in the indictment, will not be contended. In the case of *The King* v. *E. J. Holland*, Lord *Kenyon*, Chief Justice, observed, that "the objection which has the most extensive effect is, that no time is alleged when the different facts happened, which are essential to sustain the charge against the defendant. That it is necessary to state some time when each fact happened, that is material to constitute guilt, is so fully established, that the question must be considered at rest." 5 *Term Rep.* 624. But it may be said, that though it may be necessary to allege a certain time in the indictment, yet it is not necessary to prove that precise time on trial. This, however, will not meet our objection, which is, that the time in this case is material, and it is necessary, when it is so, both to allege and to prove it precisely.

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We consider, that to support an indictment for perjury, it is incumbent on the government to show, not merely that the prisoner has sworn falsely; for if the oath be *extrajudicial*, he cannot be convicted; but that he has testified falsely in a material fact before a Court who had competent authority to administer the oath and to try the cause. A Justice of the Peace, in the ordinary walks of life, has no power to administer oaths. He cannot ambulate his County and redress wrongs *ex debito justiciæ*. He can only do it when proper occasions present, which are provided for by statute, or arise under the common law. When he holds a Court, he can administer an oath to a witness to testify *viva voce*, but this only while his Court is open. Therefore the time of holding the Court is material in an indictment of this nature. We may have traversed the Court's having been holden at that time. It is not, as in the case of murder or arson, where, if a day is laid in the indictment, another day may be proved, for murder and arson are crimes, whether committed one day or another; but if the Justice held no Court on the day laid in the indictment, and even administered the oath to the prisoner, and he swore falsely, he cannot be convicted of perjury, for the oath is extrajudicial.

Further, it may be observed, that the Justices of the Peace may hold Courts on every secular day in the year, and frequently have several Courts in successive months, for trials of issues between the same parties, and administer oaths to the same witnesses. If the day be not material, how shall the prisoner in such cases distinguish, that he may be prepared for his defence?

We have a further objection, which is, that if an indictment misrecites a record, it is fatal.

It will not be denied, that if an indictment misrecites a statute, though the statute be *general*, and need not have been recited, it vitiates the indictment; and it would seem equally clear, that if an indictment misrecites a record, which is a *sine qua non* to the support of the indictment, it will be fatal.

In *Com. Dig.* vol. 6. p. 173. tit. *Record*, C. we find a variety of cases in civil causes where the misrecital of a record is fatal; as, in the case of *Ince* v. *Hay*, *T.* 9. *G. Fort.* 353. "If debt on judgment of *Hilary* term, and *nul tiel record* pleaded, it appears to be a judgment of *Easter* term;" if the name of any party, his abode or addition varies, 1 *Roll.* 753. l. 45. Surely a variance from the record in an indictment in favour of innocence will be held equally as fatal.

It may perhaps be said, that the 17th section of the statute upon which the indictment is founded, has given a latitude to prosecutions for perjury. It may as to the form of the indictment, but this section does not reach the evidence which may be necessary in support of it. This section is transcribed *verbatim et literatim* from the stat. 23 *Geo.* II. c. 11. and in the case of *The King* v. *Dowlin*, 5 *Term Rep.* 317. the prisoner was indicted for a perjury committed at an admiralty sessions, on the trial of one *Kimber*. After verdict, on motion in arrest of judgment, it was objected, that the admiralty commission was misrecited in the indictment; and although the rule was discharged, Lord Chief Justice *Kenyon* observed, in delivering his opinion, "I admit that, although it was not necessary for the prosecutor to set

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out in the indictment the commission at the admiralty, *yet as he has undertaken to do it, if it be not properly set forth*, the indictment does not show a sufficient authority to try *Kimber*." In this case reliance was had, in support of the indictment, upon the statute of 23 *Geo.* II.

The Attorney for the State arose to reply, but was interrupted by the Court.

If an indictment charges a perjury to have been committed before a Justice of the Peace, and misrecites the day of holding his Court, the record may be read, especially if the misrecital be under a *videlicet*.

Curia. In every sufficient indictment for perjury, it must be allegated, that an oath has been taken before a competent jurisdiction in a judicial proceeding, and that the accused testified falsely to some matter material to that in hearing. These are essential qualities, without which the crime could not exist, and must not only be set forth in the indictment, but sufficiently proved, in order to conviction. It is likewise necessary to show in the indictment a year and a day on which the material facts in it happened. It sometimes is necessary, that the precise time set forth in the indictment should be proved; sometimes it is not. Where the precise time is essential to the commission of the offence, there the year and day laid in the indictment must be proved. But the day of holding the Court before which the perjury is allegated to have been committed, is not an essential quality to the crime; and it is sufficient to prove any other day within the purview of the statute of limitations. The day of holding the Court is introduced in the indictment under a *videlicet*, in which case it seems by the books a greater latitude of proof is always allowed; but without entering into this nice distinction, the Court consider,

State v. Clark.

that the indictment explicitly charges the prisoner with wilful and corrupt perjury. If the charge is brought substantially home to him by plenary proof, it can be no legal or moral defence, that he committed the perjury on another day than that laid in the indictment.

Let the record be read to the Jury.

The witnesses disagreeing as to the testimony of the prisoner on the trial between *Titus* and *Hubbel*, and the fact of the endorsement on the promissory note not being fully proved, the Jury returned a verdict of not guilty.

William C. Harrington, for the State.
Amos Marsh, for defendant.

JUSTIN DAY, Appellant,
against
WILLIAM SWEETSER, Appellee.

In all civil causes, where there has been a commitment upon mesne process, the creditor must be prepared to charge the debtor in execution within 15 days next after the rendering final judgment against him, or the debtor be *de facto* a prisoner at the time final judgment is rendered, or not.

ACTION on the case for an escape.

General issue pleaded, and the pleadings closed to the Court.

The plaintiff declared, That on the 23d of *September*, 1794, he purchased out a writ of attachment against one *Josiah Farnum*, in which he declared upon a promissory note made to him by *Farnum* for the sum of 113 dols. 84 cts. and interest, which writ

he will lose his lien on the sheriff, as keeper of the prison, whether

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of the prison, but *non constat* that a return of *non est* by a deputy sheriff would show that the prisoner had escaped, as the sheriff's deputies were not *ex officiis* deputy keepers of the prison, but generally one of them deputed and appointed for the purpose, who in fact may be deputy or under gaoler without being deputed as a deputy sheriff, and by the law the sheriff may keep the prison as gaoler himself.

A former sheriff is not liable for the escape of a prisoner during the shrievalty of his successor, though such prisoner was committed on mesne process, during his own continuance in office, *provided* he has regularly delivered over such prisoner to his successor.

Curia. On perusal of the files at our chambers, we noticed that the defendant *Sweetser* was not sheriff at the term of rendering the final judgment, nor ever after, he having gone out of office on the 1st *December*, 1796. A question may arise whether he could be answerable for the safe keeping of a prisoner within the County gaol after his commission had expired. Certainly he could not, if he had regularly delivered over such prisoner under the keys, to his successor in office. How this was, does not appear; but as the Court are with the defendant on the two points made, it will not be necessary to investigate this subject.

Haw. edit. *Vermont* Stat. p. 280. passed Oct. 27, 1791.

The statute provides, "that when any person shall be attached upon mesne process, and shall be committed agreeably to this act, and shall be in gaol at the term final judgment shall be rendered against him, shall, unless the plaintiff in said action, within 15 days after rendering final judgment as aforesaid, charge him with execution, be discharged from confinement."

On the first point, the Court consider, that in all civil cases, where there has been a commitment upon mesne process, the creditor must be prepared to charge the debtor in execution within 15 days next

after the rendering final judgment against him, or he will lose his lien on the sheriff as keeper of the gaol, whether the debtor be *de facto* a prisoner at the term at which final judgment shall be rendered, or not. If the debtor has been legally committed, and not legally discharged, he is, in contemplation of law, in the sheriff's custody within the prison.

Upon the second point, the Court consider that there is a distinction between a commitment upon a writ of execution, and a commitment upon mesne process. In the former case, the sheriff is at all events, excepting the prisoner is admitted to the liberties, and is legally discharged, to keep his prisoner in *salva et arcta custodia*, in order, as the books express it, "to compel him the more speedily to pay his debt, and make satisfaction to his creditor." But in case of imprisonment on mesne process, the sheriff is obliged to have his prisoner amenable within the prison to the creditor's execution, within the 15 days next after rendering the final judgment. If he does this, he is secure against an action for an escape. When an execution is delivered to any other officer than the sheriff himself, or to the gaoler, being a deputy sheriff, a general *non est* is not evidence sufficient to charge the sheriff with an escape; for it is reasonable that there should be evidence of a demand of the debtor's body by such officer at the gaol.

The plaintiff now moved to enter a new suit, and had leave.

Plaintiff nonsuited.

William C. Harrington, for the plaintiff.
Daniel Chipman, for the defendant.

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Note. The several opinions of the Court in this cause were predicated on the construction of the act of the 27th of *November*, A. D. 1791, entitled, "an act relating to mesne processes;" which act was repealed on the revision of the statutes by the general repealing act of the 10th of *November*, 1797, with a saving clause as to all matters and things done during its existence. But it will be observed, that the section of the act of 1791, above quoted, is grafted into the judiciary act, passed *March* 2, 1797, and forms *verbatim et literatim* the 36th section of this act. How far the opinions of the Court above reported will apply to the section in its present connection with other sections of this act, and other statutes, must remain for future discussion....*Reporter.*

JAMES SAWYER, Sheriff of Chittenden County, Appellant,
against
JONATHAN HOYT and SILAS HATHAWAY, Appellees.

In an issue to the Jury, whether a discharge, release or receipt be fraudulently obtained or not, an estoppel cannot be urged to the exclusion of testimony showing the fraud, as the Court will not notice an estoppel unless relied on in the pleadings.

DEBT on a gaol bond executed to the plaintiff for the liberties of the prison.

The plaintiff demanded 200 dollars, and declared on the penal part of a bail-bond executed by the defendants jointly and severally with *Levi Allen*, dated 31st of *July*, 1798.

The defendants prayed *oyer* of the bond and condition, which was read. It appeared that the defendants had executed the bond jointly and severally

as sureties for *Levi Allen*, then a prisoner in *Chittenden* County gaol, who had been committed on a writ of execution, dated the 16th of *June*, 1798, which had issued upon a judgment rendered by the Supreme Court of Judicature, *June* adjourned term, 1798, in favour of *Thomas Sandford*, *William Kindall*, *Daniel Warner*, *Elijah Pratt*, and *Aaron Adams*, for the sum of 114 dols. 57 cts. costs, recovered in an unsuccessful suit brought by *Allen*, conditioned in the usual form, that *Allen* should not depart the liberties, unless, &c. and save the sheriff harmless.

The defendants pleaded in bar, confessing the judgment, writ of execution, commitment, and execution of the bond. They say, that the plaintiff from having and maintaining his action against them ought to be barred; because they say, that long before the commitment of *Levi Allen* to prison, as set forth in the condition of the bond, to wit, on the 27th of *June*, 1798, at *Weybridge*, in *Addison* County, *Thomas Sandford*, one of the creditors in said judgment, for himself and the other privies to said judgment, for a valuable consideration therein expressed by his memorandum in writing under his hand, commonly called a release, receipt, or discharge, which the defendants have here ready in Court to be produced, released and discharged the said *Levi Allen* from said judgment, *et hoc parati sunt verificare*; and then, after the usual averments, prayed judgment, and for their costs.

The plaintiff craved *oyer* of the memorandum, which was read to him in the words and figures following, to wit:

Sawyer v. Hoyt and Hathaway.

Know all men by these presents, that I, *Thomas Sandford*, of *Weybridge*, in the County of *Addison*, in consideration of one dollar received of *Levi Allen*, do exonerate and discharge the said *Levi Allen* from all notes, book-debts, bonds, bills, judgments of Court, executions, extents, quarrels and controversies, or matters now depending in law or equity or otherwise, for or by reason of any transaction that hath taken place between the said *Levi* and said *Thomas Sandford*, or between the said *Levi* and said *Thomas Sandford*, *William Kindall*, *Daniel Warner*, *Elijah Pratt*, and *Aaron Adams*, to this date, being the 27th of *January*, 1798.

his
Thomas ⋈ *Sandford.*
mark.

And the plaintiff protesting that *Thomas Sandford* was not interested in the judgment obtained in his name with *Kindall* and others, who had formerly been partners in the contract for the non-fulfilment of which *Allen* had prosecuted them jointly, and they had recovered their costs, which costs were contained in the writ of execution upon which *Allen* had been committed, but had long before the suit been discharged from all interest in the partnership, and had been in no ways concerned in defending the suit, but was merely a nominal party therein. For replication to the defendants' plea in bar, he says, that he ought not to be barred, because he says, that the said receipt, release or discharge, proferted in the defendants' plea in bar, was fraudulently, surreptitiously, and by covin, obtained from said *Sandford* by said *Allen*, he the said *Sandford* being an illiterate man, not having had the benefit of an education

within this State, and wholly incapable of reading writing. Wherefore, &c.

The defendants, protesting that *Sandford* was and is interested in the judgment obtained by him with *William Kindall* and the others, and in the writ of execution upon which *Levi Allen* was committed, &c. rejoin and say, that the plaintiff from having and maintaining his action against them ought to be barred, for that said receipt, release, or discharge was not obtained surreptitiously, fraudulently and by covin, from said *Sandford* by said *Levi Allen* in manner and form as the plaintiff in his replication hath alleged, and this they pray may be inquired of by the country.

And the plaintiff doth the like.

A Jury was empannelled to try this issue.

In support of his replication, the plaintiff offered to show the fraud in *Allen* in obtaining the discharge.

To such showing,

Marsh, for the defendants, objected, and insisted, that the plaintiff standing in the shoes of the original creditors, *Sandford*, *Kindall*, and others, and bringing this action for their eventual benefit, was *estopped* to deny the discharge of any one of them.

Sed per Curiam. The issue carved by the parties is, whether the discharge was fraudulently obtained or not; and this is the sole question to the Jury. If the defendants had inclined to rest their defence on this point of law, they should have demurred to the plaintiff's replication: but since they have elected to

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traverse the fraud to the country, to show the fraud in *Allen* in obtaining the discharge, must be considered pertinent to the issue.

Co. Litt. 305.

Estoppels are said to be odious in law. The doctrine of estoppels is one of those hard but perhaps necessary precepts of the law, where, for the acquirement of a general good, particular injury is often suffered to be inflicted. It was introduced originally to prevent chicanery, but it has sometimes been made the sanction of fraud. The Court certainly will not be inclined to apply it in cases of an alleged fraud, where the pleadings do not render it absolutely necessary. It has been decided in the parent country, that estoppels cannot be taken notice of unless relied on in pleading; and so this Court have ever considered.

2 *Mod.* 57.

Let the evidence be admitted.

The facts which appeared in evidence were, That *Sandford* was an illiterate man. That on the 27th of *June*, a few days after the judgment had been obtained, *Allen* sent for him by a *special agent* to come and settle with him. That *Sandford* came; but at this time he knew that there had been an action pending in the Supreme Court in favour of *Allen*, against himself, *Kindall* and the others, but imagined that the action had been discontinued. *Allen* informed him that it had been called out of Court, and the parties both considered that it had been in their whole conversation. *Allen* proposed to pass receipts, and wrote two, each for the consideration of one dollar, and each similar in language, as applicable to a mutual discharge. These receipts were read correctly and audibly in the hearing of *Sandford*. *Allen* then signed

one of the receipts, and pushing it on the table towards *Sandford*, requested him to sign it. *Sandford*, hesitating, said, "If I thought there was no trick in it, I would sign it; for I owe you nothing, and you owe me nothing." *Allen* appearing to be offended, said, "Sir, do you doubt my honour? This is the first time my honour was ever called in question by nobility or gentry in *Europe* or *America*." *Sandford* then signed the receipt, and delivered the receipt to *Allen*.

The Jury returned a verdict for the plaintiff.

The defendants entered a review, and at the *January* term, 1804, were defaulted by order of Court for neglect in advancing fees.

Samuel Miller, *Daniel Chipman*, *Elnathan Keyes*, and *Josias Smith*, for the plaintiff.

William C. Harrington and *Amos Marsh*, for defendants.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JUNE ADJOURNED TERM, A. D. 1803.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

WILLIAM WALLACE
against
BENJAMIN FARNSWORTH.

Vermont Stat. vol. 1. p. 90. For form of the writ, see vol. 2. p. 356.

IN ERROR. *Oyer* of the record craved, *et in nullo est erratum* pleaded.

Upon inspection of the record, it appeared, That *Wallace*, the plaintiff, had impleaded the defendant in an action of ejectment, in the novel mode of bringing such action, provided by the 88th section

A plaintiff in ejectment brought under the 88th section of the judiciary act, is not obliged to join a landlord with the tenant in possession, who holds by parol lease, or by written lease unrecorded, unless it can be proved, that the plaintiff had knowledge of the existence of such lease.

of the judiciary act, which is, " that instead of the circuitous mode of prosecuting for the recovery of landed property, heretofore used in this State, any person having claim to the seisin and possession of lands, tenements and hereditaments, shall have an action by writ of ejectment, according to the nature of the case as nearly as may be, agreeably to the form prescribed by law, which action shall in all cases be brought, as well against the landlord or landlords, if any there be, as against the tenant or tenants in possession of the premises demanded; *and if any such action be otherwise brought, the same shall on motion be abated;* and the judgment recovered in such action shall, while remaining in force, be conclusive against the defendant or defendants, their heirs or assigns; and if the plaintiff or plaintiffs shall neglect to join the landlord or landlords, if any there be, with the tenant or tenants in such action; or shall, by collusion with the tenant or tenants, recover judgment against him, her or them, for the seisin or possession of any lands, tenements or hereditaments, such landlord or landlords shall not be prejudiced thereby, but shall, in any trial thereafter to be had, of his, her, or their right to such lands, tenements, or hereditaments, against the person or persons so recovering as aforesaid, or any holding or deriving claim from or under him, her or them, be taken and holden to have the prior possession."

The plaintiff entered his action at the *February* term of *Chittenden* County Court, A. D. 1802.

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Plaintiff's Declaration.

Summon *Benjamin Farnsworth*, of, &c. to appear, &c. to answer unto *William Wallace*, of, &c. in a plea that to the said *Wallace*, plaintiff, the said *Farnsworth*, defendant, render the seisin and peaceable possession of a certain tract or parcel of land, with the appurtenances, lying and being in *Richmond* aforesaid, bounded on *Onion* river, being next above *Bolton Old Corner*, and being the same farm on which the late *Joseph Wilson* formerly lived; who in his life-time mortgaged the same to the plaintiff, and on which the said *Benjamin Farnsworth* now lives, occupies, and improves, of which tract or parcel of land the said *Wallace*, on the first day of *June*, 1801, was well seised and possessed in his own right in fee, and continued thereof possessed until the first day of *September* then next following, when the said *Benjamin Farnsworth*, without law or right, and contrary to the will of the said *Wallace*, thereinto entered, and ejected, expelled, and amoved the said *Wallace* therefrom, and ever since hath, and still doth keep the said *Wallace* from the premises, taking the whole profits thereof to himself, which is to the damage of the plaintiff, as he says, 1,000 dollars; to recover which, and the peaceable possession of the premises, together with just costs, he the said *William Wallace* brings this suit.

At which term the defendant appeared, and the cause was continued until the *February* term, 1802, and again continued until the *September* term, 1802, when the defendant filed the following plea:

Chittenden County Court, } *September term, A. D.* 1802. } Now the defendant here in Court comes and defends the force and injury, when, &c. where, &c. and pleads and says, that he is not guilty in manner and form as the plaintiff in his declaration hath alleged, and thereof puts himself on the country for trial.

By his attorney,

Isaac M'Nicle.

And the plaintiff likewise.

By his attorney,

Samuel Miller.

The cause was then continued until the *February* term, 1803, when the defendant filed the following motion:

State of Vermont. } *Chittenden* County Court, *Fe-*
Chittenden, ss. } *bruary* term, A. D. 1803.

William Wallace, plaintiff,

v.

Benjamin Farnsworth, defendant.

And now the said *Benjamin* in Court doth motion, that the plaintiff's said writ and process may abate and be dismissed; for that the same is a writ of ejectment brought against the said *Benjamin;* that the lands therein described are lands which the said *Benjamin*, at the time of the service of the said writ, held and possessed by a verbal lease under *Sarah Wilson*, who then did, and yet does, possess the same lands, as administratrix on the estate of *Joseph*

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Wilson, deceased, intestate, and that the said *Benjamin* had, before and after the service of said writ, hired and leased the said lands of the said *Sarah Wilson*, and hath not held the same by any other title or claim, and for that the same action being brought, and said writ being served on the said *Benjamin*, and not on the said *Sarah*, as it ought to have been, according to the statute in such case made and provided, the said *Benjamin* prays said writ and process may be abated and dismissed, and he have his costs. By

Harrington & M'Niele.

On this motion the County Court ruled the action abated, and taxed costs for the defendant.

To reverse this judgment the present writ is brought.

And now the said *William Wallace* in fact says, that in proceeding to and rendering said judgment, manifest error hath intervened.

First. For that by law no judgment in favour of the defendant can be predicated on said motion or plea of the defendant as aforesaid.

Secondly. For that no such plea in abatement can by law be exhibited after pleading the general issue and joinder therein, and after continuance had in said cause.

Thirdly. For that it is unnecessary to join any pretended landlord or landlady with any pretended tenant, unless such tenancy appear by deed or contract in writing, and is put upon public record.

Fourthly. For that by said motion or plea, it does not appear that the said *Benjamin Farnsworth* was or is tenant to the said *Sarah Wilson*, or that said *Sarah*

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Whom had or hath any claim or title to the premises.

Then followed a general assignment of errors.

This cause was submitted without argument, and the Court, after stating the substance of the record, with the exceptions in error, delivered the following opinion:

Curia. The Court are decidedly of opinion, that the County Court erred in suffering the plea or motion in abatement to be filed after the general issue had been pleaded and joined, and after imparlance. An abatement being a dilatory plea, should not be pleaded after imparlance, and surely not after the general issue had been pleaded and joined; but it is probable in this instance, the County Court considered itself bound to depart from the general rule of practice by the words of the statute, which are, "that if any such action shall be otherwise brought, the same shall on motion be abated," without specifying the time at which such motion shall be filed. But it may be observed, that the object of the statute is to prevent an injury which may be received by the landlord by a judgment in ejectment against his tenant, without his being made privy to the suit. The tenant may therefore show his tenancy in abatement; and it is his duty to do it on the second day of the first term, according to the established rule of practice; but if he should neglect to do this, "the judgment shall, while remaining in force, be conclusive against him, his heirs and assigns;" but such judgment shall not prejudice the landlord, for the statute in the ensuing clause declares, "that if the plaintiff or plaintiffs shall neglect to join the landlord or

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landlords, if any there be, with the tenant or tenants in such action, or shall, by collusion with the tenant or tenants, recover judgment against him, her, or them, for the seisin or possession of any lands, tenements or hereditaments, such landlord or landlords shall not be prejudiced thereby, but shall, in any trial thereafter to be had, of his, her, or their right to such lands, tenements, or hereditaments, against the person or persons so recovering as aforesaid, or any holding or deriving claim from or under him, her, or them, be taken and holden to have the prior possession." So that the waiver of the plea in abatement by the tenant, cannot injure the landlord eventually; and *the motion*, as it is styled in the statute, stands upon the ground of every other plea in abatement, and should have been subjected to the same rule of pleading.

The second exception merits attention, as this is the first time this clause of the statute has come under the particular consideration of the Court. The words of the statute are, " which action (*the action of ejectment*) shall in all cases be brought as well against the landlord or landlords, if any there be, as against the tenant or tenants in possession of the premises demanded."

The question is, what is the intent of the statute in the word tenant? or rather, what shall be the evidence of such tenancy, as renders it incumbent on the plaintiff to join the landlord with the tenant in the action of ejectment? Does the statute intend a tenant by indenture of lease? and must such be recorded, or does it intend a tenancy by mere parol? Were the question only what the nature of the tenancy should be, the Court would be inclined to consider,

that as the object of the statute is to prevent a judgment in ejectment against the tenant, it would be immaterial what the tenure was. It would be sufficient that it was such between the tenant and the landlord; that it was suitable that the former should give notice to the latter of the suit, for the brevity or weakness of the tenant's tenure ought not to affect the landlord's privilege of being made privy to the action. The statute provides, that "the plaintiff shall join the landlord or landlords, *if any there be.*" The term tenant does not necessarily imply a landlord, excepting as all lands are held under the sovereign as lord paramount; and the term "*tenant,*" when not put in apposition with "*landlord,*" as in case there be no landlord, is borrowed from our former mode of bringing the action of ejectment by *lease, entry and ouster,* where there was a supposed tenancy by actual lease; but the term tenant here supposes a mere tenant by possession, or the actual possessor of the land: therefore the statute speaking of a possible landlord, says, "*if any there be.*"

What then shall be plenary evidence to the plaintiff, that there is any landlord who it is incumbent on him to join with the tenant in possession, or the actual possessor of the land, in his action of ejectment? for it seems the existence of a landlord is a point necessary to be determined by the plaintiff on the impetration of his writ. If a person ejects another from his land, and the plaintiff brings his action against him, not knowing of any person under whom the ejector may hold, it might seem unreasonable that the ejector should defeat his process by showing, that by a contract known only to the parties, he was a tenant to some one. On the other hand, if the

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plaintiff was at all times allowed to plead ignorance of the ejector's holding as a *lessee*, the statute would be defeated. Where then shall the line be drawn to give the statute a rational construction?

Vermont Stat. vol. 1. p. 189. c. 10. s. 5.

The act regulating the conveyances of real estates, and for the prevention of frauds therein, is considered by the Court to bear upon this subject, when it enacts, "that no deed of bargain and sale, mortgage, or other conveyance in fee-simple, fee-tail, or for term of life, or any lease for more than one year from the making thereof of any lands, tenements, or hereditaments in this State, shall be good and effectual in law to hold such lands, tenements, or hereditaments against any other person or persons but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." Here appears to be a line drawn between the evidences of land tenures which shall be considered to be known to third persons, and those which third persons are not obliged to notice, though they shall enure against the contracting parties, their heirs and assigns.

The Court do not, however, go so far as to say, that in every case of parol lease the plaintiff in ejectment is excused from joining the landlord with the tenant in an action against the latter; for if the knowledge of the existence of the lease can be carried home to the plaintiff, his writ shall abate, if he has neglected to join the landlord with the tenant. But then, if the defendant, when sued alone, would take advantage of this, he must set forth such knowledge in the plaintiff in his plea in abatement.

The Court therefore consider, that a plaintiff in ejectment, brought under the 88th section of the ju-

diciary act, is not obliged to join a landlord with the tenant in possession, who holds by *parol lease*, or written lease unrecorded, unless it can be proved that the plaintiff had knowledge of the existence of such lease. As such knowledge in the plaintiff is not allegated in the defendant's motion or plea in abatement, the Court consider, that the County Court erred in abating the plaintiff's process for the cause therein assigned.

The remaining exceptions in error, as the former are held valid, do not require a particular consideration at this time.

Let judgment be entered, that the Court having inspected the record, do find that there is error in the same, and that the judgment of the County Court be reversed.

TYLER, Assistant Judge, hesitated in opinion as to the second exception. He noticed, that the plaintiff had in his declaration, in describing the land, alleged, that it was "the same farm on which the late *Joseph Wilson* formerly lived, who in his life-time mortgaged the same to the plaintiff." This implied, that the fee of the lands demanded by an existing contract, was in the heirs of the intestate *Wilson*, whose administratrix is set forth in the defendant's motion or plea in abatement to have been his lessor. The plaintiff, as mortgagee, must have been conusant of the claim of the representatives of *Wilson;* and as lands in this State are or may be assets in the hands of the administrator, or at least held by him for certain purposes, and for an uncertain time, to be divided among the heirs, through the administrator's instrumentality, under a decree of the probate,

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the plaintiff must have had such knowledge of the tenancy by his own showing, as rendered it incumbent on him to join the lessor with the tenant; but he concurred with his brethren as a general rule, that the plaintiff in an action of ejectment brought under the 88th section of the judiciary act, is not obliged to join a landlord with the tenant in possession, who holds by parol lease, or written lease unrecorded, unless it can be proved that the plaintiff, before the impetration of his writ, had knowledge of the existence of such lease; and that, if the tenant would take advantage of this in abatement, he must specially allegate such science in the plaintiff in his plea.

Samuel Miller and *Amos Marsh*, for plaintiff.
William C. Harrington, for defendant.

CHARLES BLIN, Appellee,
against
HAY and TRIMBLE,
Administrators of GEORGE TRIMBLE.

A submission to five arbitrators by name, the award to be made in writing by a majority of them, though such award be signed by a majority of the arbitrators, it is insufficient, if it does not set forth that the minority were present at the hearing, or at the least that they were notified of the time and place of the meeting of the arbitrators.

DEBT on an award of arbitrators. Demurrer to the declaration.

This action was originally commenced against *George Trimble;* but on his death being suggested on the record, the administrators entered as defendants.

The plaintiff declared against *George Trimble* in a plea that he render to him the sum of sixty-two

pounds ten shillings of the current money of the State of *New-York*, equal in value, &c. which he justly owes, &c. for this, to wit, whereas there were certain disputes and controversies subsisting between the said *Charles Blin* and the said *George Trimble*, then both of *Crown Point*, in the State of *New-York*, respecting the use, rent, or occupation of certain lands, held, used, occupied, and enjoyed by the said *Charles Blin*, and the value of certain improvements made thereon, they therefore, the said *Charles* and *George*, on the 10th day of *January*, A. D. 1795, for the final end and determination of all such disputes, by their certain bond or obligation in writing, sealed with the several seals of them the said *Charles* and *George*, covenanted and agreed, that *William Bott*, Esquire, of *Willsborough*, *John N. Bennet*, Esquire, of *Bridport*, Mr. *Moses Taylor*, of *Crown Point*, *Nathaniel Moseley*, Esquire, of *Bridport*, and *Cornelius Vander K——*, of *Crown Point*, should be arbitrators mutually chosen by each party to meet at the house of *Charles Blin*, aforesaid, on the first *Monday* after the 20th of *February* next, meaning and intending, as the plaintiff avers, the 25th day of *February*, A. D. 1795, to take into consideration, examine, determine, and award, what is the value of all the improvements, whether in buildings, fences, or orcharding, made by the said *Charles Blin* on the lands he then possessed or claimed the possession of in a patent of land called *Cornel's Patent*, the amount of which the said arbitrators are to charge to the said *George*, and they are likewise to examine and award what the yearly rent, use, or occupation of all the lands used, occupied or enjoyed by the said *Charles Blin*, from the time of his first

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coming on to the patent aforesaid, to the date of the said covenant or agreement, viz. the 10th of *January*, 1795, aforesaid, the amount of which to be charged to the said *Charles Blin*, and to determine and award which party ought to pay the legal costs which accrued, the amount of which to be charged to him; which award the said arbitrators, or a majority of them, are to sign and seal, and deliver to either or both parties requesting, in ten days from the date of the first meeting, which award, executed by the said arbitrators, or a majority of them, as above mentioned, they the said *George* and *Charles* covenanted and agreed, that it be made a rule of the Court of Common Pleas for the County of *Clinton*, in said State of *New-York*, as by the said writing obligatory, ready in Court to be shown, may fully appear; and whereas afterwards, to wit, on the 25th of *February*, 1795, the aforesaid *William Bott*, *Moses Taylor*, and *Nathaniel Moseley*, a majority of the arbitrators mutually chosen as aforesaid, according to the submission above recited, having fully examined and duly considered the proofs and allegations of both the said parties, did make and publish their award between the said parties, subscribed with their names, and sealed with their seals, in manner as follows, that is to say;

First. They did award and order, that all actions, suits, quarrels, and controversies whatever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatever, touching the said premises, to the day of the date of their award, should cease and be no further prosecuted, and that each of said parties should pay and bear all the legal costs of any action or actions that have subsisted between the said parties prior to

this arbitration, equally between them, and the costs of this arbitration shall be paid equally between said parties.

Secondly. They did also award and order, that the said *George Trimble* should pay or cause to be paid to the said *Charles Blin* sixty-two pounds ten shillings, current money of the State of *New-York*, equal in value to the current money of this and the *United States* as aforesaid, on or before the 15th day of *May* next, meaning and intending, as the plaintiff avers, next after the day of the date of said award. And,

Lastly. They did award and order, that the said *Charles* and *George*, on payment of the sum of 62*l.* 10*s.* of the State currency as aforesaid, equal, &c. should in due form of law execute each to the other of them, or each to the other's use, general releases sufficient in law for the releasing of or by each to the other of them, his or their heirs, executors, and administrators, of all actions, suits, awards, quarrels, controversies and demands (excepting one certain bond, which the said *George Trimble* holds against the said *Charles Blin*, conditioned for the delivering the possession of the house and land on which the said *Charles Blin* then lived, to the said *George Trimble*) whatever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the aforesaid 10th day of *January*, A. D. 1795, as by the award here ready in Court to be shown may fully appear; which said award, rendered as aforesaid, was signed, sealed, and ready to be delivered to the parties, within ten days from the first meeting of said

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arbitrators; and the said *Charles Blin* further saith, that he hath done and performed all things on his part to be done and performed according to the submission and award so made as aforesaid; and the said *George Trimble* hath wholly refused and neglected to pay to the said *Charles Blin* the said sum of 62*l.* 10*s.* current money of the State of *New-York*, equal, &c. although the time of payment hath long since elapsed, or to do and perform the things awarded to be done and performed on his part, but he to do the same, although often requested, hath hitherto wholly refused, and still refuses so to do; wherefore an action hath accrued to the said *Charles*, to have and demand of the said *George Trimble* the said sum of 62*l.* 10*s.* current money, &c. equal, &c. for the recovery of which, with just costs, he brings suit.

To this declaration the defendants demurred, and for causes of demurrer set down, that the award was not in pursuance of the submission, in the following particulars:

First. That the submission was to five arbitrators, whilst the award was made by three, and did not set forth that the other two were present or notified.

Secondly. That the submission was of a *particular* controversy, respecting improvements made by the plaintiff on certain lands, and what was the value of the yearly rent of the land, whereas the award directed, that the parties to the submission should in due form of law execute to each other of them releases sufficient in law to release all actions, suits, awards, quarrels, controversies, and demands, touching or concerning the premises, or any matter or thing thereunto relating, from the beginning of the world

to the day of the date of the award, which releases would bar things not submitted.

The cause was submitted without argument, and the Court delivered the following opinion:

The first exception to the sufficiency of the declaration is, that the award was by three whilst the submission was to five arbitrators, the other two not appearing to have been present at the meeting, or notified.

The award declared upon appears to have been signed, &c. by three of the arbitrators; so far it is consonant with the submission: but the Court consider that the submission was to the whole five. "It is covenanted and agreed, that *William Bott* and the others, naming the whole five, shall be arbitrators," to take into consideration the subject matter of the submission; and that, as it does not appear that the two who did not sign the award were present, or notified of the time and place of meeting the award in this respect, does not follow the submission, and the declaration is considered insufficient.

The Court are confirmed in this opinion by recurrence to the books, more especially to the case of *Dalling* v. *Matchet*, *Mich.* 14 *Geo.* II. *Barnes's Notes*, p. 57.

Parties to an arbitrament, without any improper motives, may have a peculiar and reasonable predilection for a particular person or persons to sit as arbitrators. The subject matter in dispute may be better comprehended by some than others, owing to their particular avocations in life. When a person submits a controversy to five arbitrators, he has rea-

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son to expect, that all will be present at the hearing of his cause, or at least that all will be notified of the time and place of meeting; for the absence of one might materially affect the award. His superior judgment in the matter in controversy may have been relied upon by the party in preference to that of all the others, and might have altered the opinion of the others; and although a majority, after a candid discussion, may make the award, yet all the arbitrators, to whom the matters in controversy have been submitted, in the terms of the present submission, ought to be present at the hearing, or at least it should appear that they were notified of the time and place of meeting, if not present.

The second exception to the declaration seems not to be so well grounded.

The great object of this and every other arbitrament is to put an end final to an existing controversy; and this power is given to the present arbitrators, and they appear not to have exceeded it in the award, as the releases directed by it to be executed by the parties to the submission, are not *general releases*, which would have been nought, but are expressly so qualified as to operate only upon "all actions, suits, awards, quarrels, controversies and demands whatever, *touching the premises*, that is, *respecting the matters submitted*, or any matter or thing thereunto *relating*."

If therefore this award had been correct in other particulars, so that it might have been pleaded in bar to any action respecting the patent of land not submitted, it could be avoided by showing, in due course of pleading, that the submission did not embrace such cause of action.

But as the Court consider the declaration to be insufficient on the first point, and grossly so in other particulars,

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Let judgment be entered for the defendants.

Declaration insufficient.

Daniel Chipman and *Elnathan Keyes*, for plaintiff.
William C. Harrington and *Josias Smith*, for defendants.

STEPHEN PEARL, Sheriff,
against
EBENEZER ALLEN.

THE Legislature, at the sessions of the General Assembly, *October*, A. D. 1802, passed the following act:

" An act restoring *Ebenezer Allen* to his law.

" Preamble. Whereas *Stephen Pearl*, of *Burlington*, in the County of *Chittenden*, in the capacity of sheriff of said County, recovered a judgment against the said *Ebenezer Allen*, by the consideration of the Honourable the Supreme Court of Judicature, holden at *Burlington*, within and for the County of *Chittenden*, at their *June* adjourned session, one thousand eight hundred, for the sum of one hundred and twenty-nine dollars and fifty-seven cents, including damages and costs, by reason of which the said

The Court are not held judicially and *ex officio* to notice a private act of the General Assembly. He that would take the benefit of it must attach it to the record.

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Ebenezer is now imprisoned in the common gaol of *Chittenden* County: Therefore,

"Section first. It is hereby enacted by the General Assembly of the State of *Vermont*, that the action of the said *Stephen* against the said *Ebenezer* be again entered on the docket of said Court, and stand open for a new trial, and that all judgments rendered against any person or persons in consequence of said judgment, be stayed, and no further proceedings thereon had.

"Section second. And it is hereby further enacted, That if the said *Ebenezer Allen* shall eventually recover in said suit against the said *Stephen*, he shall have right to tax his legal costs from the commencement of his said suit, and his legal costs, which have arisen in all suits which have been instituted in consequence of said judgment.

"Section third. And it is hereby further enacted, that on the said *Ebenezer's* procuring bail to the amount of seven hundred dollars, to the acceptance of the sheriff of said *Chittenden* County, that his body shall be forthcoming to be charged in execution, if final judgment be rendered against him in said suit, it shall be the duty of said sheriff to permit the said *Ebenezer* to go at large whither he will; and no suit shall be maintainable against said sheriff for an escape, nor against the surety of the said *Ebenezer* on the bond heretofore taken for the liberties of the prison, on the execution at the suit of the said *Stephen* by virtue of which he is now imprisoned."

At the *February* term, A. D. 1803, *Ebenezer Allen* procured the clerk to docket the action referred to in the act.

Keyes, counsel for the sheriff, moved that it might be struck from the docket, as it appeared to be an entry without mesne process. Pearl v. Allen.

Harrington, counsel for *Allen*, stated the substance of the act, but confessed that he could not produce it, as by some delay of the press, the annual pamphlets containing the acts of the last session of the General Assembly had not been distributed; but as the Court knew of the passing of the act, he trusted they would suffer the action to remain upon the docket.

Sed per Curiam. This act, as it is represented by Mr. *Allen's* counsel, is a private act, and as such the Court are not obliged judicially and *ex officio* to notice it. If advantage would be taken of it, it should be attached to the record. If such act has been passed by the General Assembly, it is no excuse for the person in whose favour it was enacted, that the annual pamphlet containing recent acts, has not been promulgated. He should have obtained a certified copy of it from the office of the Secretary of State.

The clerk is directed to erase the action from the docket.

Action erased from the docket.

And now, at the present term, *Harrington*, counsel for *Allen*, procured the clerk to docket the action again, and filed with the clerk an office copy of the act, certified by the Secretary of the State.

Hitchcock moved that the action should be struck from the docket.

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First. Because it is an action without mesne process, and not entered by special leave or order of Court.

When the Legislature, by a private act, grant a new trial, and make no mention of the term at which the action shall be docketed, it shall be construed to intend the next term after the passing of the act; and an adjourned term, when a stated term intervenes, shall not be considered as the next term.

Secondly. If the action could be sustained without process by operation of the act, it should have been entered the last term of the Court, and cannot be entered the present term.

Thirdly. Because the act is unconstitutional, and therefore void.

Hitchcock, counsel for *Pearl*. The act does not provide for any process, and therefore has left *Allen* subject to the same rules and regulations as to process, as all other suitors are.

There are several modes by which an action may be brought into this Court.

The first and most common is by appeal from such subordinate Court, over whom this Court have appellate jurisdiction.

Secondly. By original process, returnable immediately to this Court. It is true that in certain cases the action may be entered in this Court, and the process issue antecedently; but in such cases the entry is made by special leave or order of the Court, or by some prerogative powers existing in the officers of government. Such are indictments by the Grand Jury, informations by the State Attorney, rules to show cause for contempt, the writ of *habeas corpus*, or *subpœna duces tecum*, &c.

This action does not come into Court in any of these modes, or in any other, if we have omitted any by which an action can be legitimately entered on the docket.

Here have been several trials, final judgment, execution, and consequent commitment; and after all this it is surely as reasonable that our client should have due notice of the revival and entry of the action, and his obligation to appear and prosecute it, as it was that *Allen* should have such notice when the action was originally commenced.

This is a private act, and an individual is not obliged to notice it, any more than the Courts of Justice, unless the knowledge of its existence is specially communicated to him by due process of law.

An attempt was made to thrust this action into Court the last term without even producing the act. But the Court observed that it was a private act, which they were not held officially to notice, unless attached to the record, and accordingly ordered the action to be struck from the docket. Our client had therefore every reason to conclude, from the decision of this Court, or at least from its operation, that the act and the action were put for ever at rest; and when a second attempt is made to force this action under the consideration of the Court, this forms an additional reason why our client ought to have had sufficient and regular notice of the attempt; and this leads us to our second exception.

That if the action can be sustained by the mere operation of the act without antecedent process, it should have been entered at the past term.

The act was passed at the *October* session of the General Assembly, 1802, and the next term subsequent to the sessions was the last *February* term, which it is manifest was the term intended by the Legislature when the action should be entered.

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The Legislature, when they granted this privilege to *Allen*, surely did not intend that it should extend to an election in him to enter the action at any future time which he might prefer; for as this very extraordinary act has stayed all proceedings on the judgments, as well against him as against any person or persons in consequence of said judgment, if *Allen* could elect a term at which the action should be entered, he would have every motive of interest to defer the entry to as distant a term as possible, as in the meanwhile the collection of a debt against him would be suspended, whilst it would be very questionable whether *Pearl*, when conusant of the act, could revive the action under it; and if *Allen* can leap over the first term after passing of the act, as to the entry of the action, why may he not a second or a third, and to what term shall he be restricted? We have, however, little occasion to dwell upon these minor defects in this docket entry, as we rest firmly upon our third exception to the entry, which cannot be shaken without shaking the constitution itself, which is, that the act itself is unconstitutional, and therefore void.

The second section of the plan or frame of government in the second chapter of the constitution vests the *supreme legislative power* in a house of representatives of the freemen of the Commonwealth or State of *Vermont*.

The third section vests the *supreme executive power* in a Governor, or, in his absence, a Lieutenant Governor and Council.

The fourth section vests the *judicial power* in the Courts of Justice.

A distinct and separate use of these powers the

framers of our constitution considered absolutely necessary to preserve the blessings of liberty, and keep the government free. Therefore, guarding against their interference in a particular instance by the 5th section, which gave the Legislature power to "erect a Court of Chancery, *provided they do not constitute themselves Judges of said Court*," it is expressly declared in the sixth section, that "the *legislative*, *executive*, and *judiciary*, shall be *separate* and *distinct*," so that neither exercise the powers properly belonging to the other; and to impress this fundamental principle upon the people, the eighteenth article of the declaration of rights declares, "that frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free; the people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right in *a legal way to exact a due and constant regard to them from their legislators* and magistrates in making and executing such laws as are necessary for the good government of the State."

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We consider the act under consideration to be unconstitutional, and therefore void, in that the provisions of it are gross interferences by the legislative with the judicial power.

The granting a trial *de novo* is properly and essentially a judicial act, and cannot be done by the Legislature; for the act of granting a new trial necessarily implies a retrospective consideration of a cause already tried, and the question whether grantable or not, often involves questions of practice in the Court,

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and not unfrequently goes to the merits of the cause, as in cases where the motion is grounded on material evidence, recently discovered; in all such cases no just distinction can be made between the power which tried the cause originally, and the power which may grant a new trial. Both are judicial, and neither legislative. If a subject is injured by another, he does not apply to the Legislature for redress, but to the Courts of Law, for the Constitution has so directed him, and he learns from it, that during the trial at least the Legislature shall not interfere. It is acknowledged by all, that during the trial they cannot interpose; if they should attempt it, the very attempt would excite a general alarm; but the Legislature consider, it seems, that they may interfere after final judgment, execution and commitment. What is the spirit of this act? Does it not in effect say to this Court, "We the Legislature, consider, that you the Judges of the Supreme Court of Judicature, have not done justice to *Allen*, one of your suitors; therefore we command you to try his cause over again." Imagine that this Court should obey this unconstitutional mandate, and *Allen* should again be unsuccessful, cannot he apply again to the Legislature, and cannot they again command? and every time they grant a new trial, even through respect to them, must it not be necessarily implied, that they revise the judicial proceedings of this Court. Where, then, is the benefit to the suitor in that the Legislature cannot interfere whilst his cause is on trial, but may at pleasure interpose after the suit is judicially terminated?

But if the Legislature formerly assumed this power, for it is manifest they never held it constitutionally, it is certain they did not possess it at the

passing of this act; for they have themselves placed the power on its constitutional ground by the act of *March* 2, 1797, which enacts, "that the Supreme Court of Judicature, and the several County Courts within this State shall have power to grant new trials in all cases within their respective jurisdictions, according to the usages of law, at the same session in which judgment was rendered in said cause, or by *petition* to any subsequent session of the same Court in which the original judgment was rendered."

Vermont Stat. vol. 1. p. 96 97.

Before the passing of this act, the judicial Courts possessed and exercised the power of granting new trials on *motion*, but not on *petition;* and as such *motions*, by the practice of the Courts, could not in their nature be filed after final judgment, execution issued, and adjournment of the Court, cases arose where, by the discovery of new and material evidence, and other causes, new trials ought reasonably to be had; and the Court having no power to grant new trials in such cases, the Legislature assumed the power, and were suffered to exercise it *ex necessitate rei;* but the act cited acknowledging the power *to grant new trials in* ALL CASES to be in the judicial Courts, the Legislature can on no pretence continue to exercise it.

But the object of this act is not merely to grant a new trial to *Ebenezer Allen*, but further to interfere with the judicial powers by directing the taxing of costs, not only in the suit on which the new trial is granted, but *his costs which have arisen in all suits which have been instituted in consequence of said judgment.*" Moreover, the act not only suspends the judgment in the suit on which the new trial is granted, but stays, if not absolves, all judgments rendered

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against any person or persons in consequence of said judgment.

Certainly there never was a stronger case, or which called more imperiously for the interference of this Court to withstand the encroachments of the legislative power than the present; for the absurdity of the act granting a new trial to *Allen* can only be surpassed by its unconstitutionality.

Whenever the Legislature exceed their constitutional powers, it is for the judicial Courts to restrain them. We are sensible that less danger is apprehended by the people from the assumption of unconstitutional power by this popular branch of the government, than from either the executive or judicial; but the people are too often blind to their own political interests, and need often to be saved by salutary checks upon their favourites, even when they are most confident, and consider themselves most secure.

We have in this act an instance of legislative interference with the judicial in granting a new trial after final judgment, execution, and consequent commitment; of releasing a prisoner from gaol, committed in pursuance of a judgment of this Court; of directing the taxation of costs; and, finally, with the two-edged sword of legislation, destroying the judgment debts of others not immediately concerned in the suit on which the new trial is granted.

If the legislative can so far interfere with the judicial powers as in this act, where shall bounds be set to their violations of the constitution? For our own part, as citizens of the government, we confess ourselves alarmed for our constitutional rights, and have reason to apprehend, that if a check is not put by this

Court to this extension of legislative power, that we shall shortly meet an act of the General Assembly, directing what shall be the opinion of this Court in point of law, or what shall be the verdict of the Jury in matter of fact.

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Daniel Chipman, counsel for *Allen*. The *first* exception to the entry must be determined by the opinion of the Court on the *third*; for if the act be constitutional, the legislative power in directing it to be entered without process, cannot be denied. In the present case there seems less occasion for mesne process, as that had already been commenced in the original institution of the suit; and all which is necessary to be effected is for the Court to take up the cause with all its proceedings, excepting the final verdict and judgment, which are suspended by the act, and to proceed in it as in any other case where a trial *de novo* is granted. The act contemplates this when it provides, "that the action shall stand open for a new trial," and that *Allen*, in case he should recover, should not merely have his costs on the new trial, but "should have a right to tax his costs from the commencement of said suit."

The mere exhibition of the act to *Pearl* supplies the place of any process to bring him into Court; for the objection prevalent at the last term, that the act is of a private nature, is now done away by its being filed in Court, and *Pearl's* appearance must estop him from pleading ignorance of its existence.

Upon the second exception we observe, that as the act has pointed out no term in which the action shall be entered, it must intend that it should be entered at some term considered to be within a rea-

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sonable time, which is left to the sound discretion of the Court. In the exercise of such discretion we trust the Court will consider that *Allen* attempted to enter the action at the last term, in a mode which it is true was considered to be irregular, but which he has rectified the present term, according to the suggestion of the bench.

It will be observed, however, that the present is but an adjournment of the *February* term, in which it is contended the action ought to have been entered, and that the whole term, both in its outset and prolongation by adjournment, is considered in legal import to be but one day.

As to the third exception, we consider the passing of the act by the Legislature to have been no unconstitutional exercise of power. It is a power acknowledged by our opponents to have been exercised *ex necessitate rei* by the Legislature in certain cases before the passing of the act of *March* 2, 1797; and we consider that it may and must be exercised *ex necessitate rei* in all cases not comprehended in this act. The present case is certainly not included in the act; the second proviso to the second section of which provides, "that no new trial shall be granted in any cause, unless the petition and citation be preferred and served on the adverse party, if the reasons assigned be a matter of law, within one year next after the rendition of the original judgment; or if the reasons assigned be the discovery of new evidence, within two years next after the rendition of the original judgment; any thing herein contained to the contrary notwithstanding." The judgment which *Allen* seeks to reverse by a new trial, was entered more than two years before passing the act, being

Vermont Stat. vol. 1. p. 97.

rendered at *June* adjourned term of the Supreme Court, A. D. 1800, and the act passed *November* 9th, 1802.

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We shall not particularly notice our opponent's alarming and picturesque statement of the destructive consequences which may be imagined to flow from the Court's sanctioning the act made in favour of our client, as we consider his observations better adapted to the political arena than for the sober precincts of a Court of Justice.

Nathaniel Chipman. Our first exception we are content should abide the decision of the Court on the third.

In reply to what has been advanced by Mr. *Chipman* on the second, we observe, that when a matter is left to the sound discretion of a Court, this discretion, to be *sound* in legal import, must be regulated by known and established principles or rules of practice. "When any thing is left to any person to be done according to his discretion, the law intends it must be done with sound discretion, and *according to law.*" 1 *Lill. Abr.* 477. What is the rule in cases where a new trial is granted? When a new trial is granted by this Court on petition, which is the most analogous case which can be put, the entry or names of the parties in the cause to be reheard, is docketed immediately on the granting the prayer of the petition, and not at any future term of the Court.

It is said the present term, being an adjournment of the term in which we contend the action should have been entered, is but a prolongation of the stated term, and must be considered in legal import to be the same.

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It is true there is a saying, that the whole term is but one legal day, but this is said in the books to be a fiction, and can only apply in cases of adjournment from morning until the afternoon sittings, or from one day to the next, or to a third day, when a *dies non juridicus*, as a *Sunday* or red-lettered day, shall intervene, which adjournments are not noticed on the record; but cannot apply to an adjourned as parcel of the stated term. An adjourned term in this State is to almost all intents and purposes a distinct and new term; for new *venires* issue, and fresh term fees are taxed, and new original entries are made. Appeals from the County Courts cannot be entered, it is true, at an adjourned term, because they are expressly restricted to the stated term by the statute; but appeals from the Probate Courts may be entered, and reviews, which can never be taken to the same term, can be entered at the adjourned term. The records of the Court are not made up as of the same, but as of a distinct and separate term; and lastly, the act itself granting the new trial, contemplates the adjourned as a separate term; for if it were not so, it would not have described the judgment as rendered by the Supreme Court of Judicature at their "*June adjourned session;*" but the judgment would have been described in the preamble as rendered by the Supreme Court of Judicature, at their *stated February term*, holden by adjournment in *June*, &c.

As to the constitutionality of the act, we briefly observe, that there is in the nature of things a distinction between legislative and judicial acts; a distinction, if not precisely defined, well understood, especially as it relates to the present subject. To this distinction the constitution refers in the section read

in the opening. It remains for the Court to decide whether the legislative have by this act, in violation of the constitution, interfered with the judicial power; which we shall submit, with the observations made in the opening; for it is not a matter of so high importance, as connected with the cause *sub lite*; as we contend, that if the Legislature ever constitutionally possessed the power to grant new trials in the Courts of Law, they have devested themselves of it by the statute of *March* 2, 1797.

It is objected, that as *Allen*, at the passing of the act of *November*, 1802, was excluded from the benefit of the act of *March*, 1797, by a limiting clause, therefore the interference of the Legislature is proper, as otherwise he would be without remedy.

But if the Legislature abandoned an assumed, or delegated a legitimate power by the act of 1797, and limited the benefit of the act to those who availed themselves of it in time; *non constat* that the Legislature can constitutionally extend the benefits of it to him who does not.

Opinion of the Court.

The Court considered, that the intent of the act was, that *Allen* should enter the action at the next term after the session of the General Assembly during which the act was passed.

That an adjourned term must be considered as a separate and distinct term for the purpose of entry in all cases where entries are proper at such term. The Chief Judge observed, that he recollected a case, although the names of the parties had escaped his memory, which was decided during his practice at

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the bar, where the Court refused the entry of an appeal from a probate decree, which had been taken before the stated, and offered to be entered at the adjourned term.

The Court ordered the action to be struck from the docket.

At their *October* sessions, A. D. 1803, the General Assembly passed the following act:

An act granting a new trial to *Ebenezer Allen*.

Preamble. Whereas the Legislature of this State, at their session in *Burlington*, A. D. one thousand eight hundred and two, passed an act granting to *Ebenezer Allen* a new trial in an action tried between *Stephen Pearl*, plaintiff, and the said *Ebenezer*, defendant, before the Supreme Court of Judicature, holden by adjournment at *Burlington*, within and for the County of *Chittenden*, in the month of *June*, one thousand eight hundred, and it having been made to appear to this Legislature, that *Ebenezer Allen* hath lost the benefit of said act, in consequence of his not being able to obtain a copy of said act seasonably from the secretary's office, on account of the absence of the secretary at the time said *Allen* applied for the same; in consequence whereof said cause was not tried before said Supreme Court, but was dismissed from the docket of the Court. To the end, therefore, that said *Allen* may now be entitled to the benefit of said act,

It is hereby enacted by the General Assembly of the State of *Vermont*, that the clerk of said Supreme

Court, within and for said County, be, and he is hereby directed to enter said action anew on the docket of said Court, at their session in *January* next, and that a new trial be had in the same manner as though no judgment had ever been had and rendered thereon in said Supreme Court of Judicature. Provided, that the said *Ebenezer Allen* shall notify the said *Stephen Pearl* thereof by causing a true and attested copy of this act to be delivered to the said *Stephen* at least twelve days previous to the sitting of said Court.

The action was entered at that term, and no further exception taken to the legislative power in passing it.

The cause went to the Jury, who returned a verdict for *Pearl*. *Vide* the report of this cause in order of time.

Daniel Chipman, for *Allen*.

Nathaniel Chipman and *Samuel Hitchcock*, for *Pearl*.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ADDISON COUNTY, JANUARY TERM, A. D. 1803.

JONATHAN ROBINSON, *Chief Judge*.
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges*.

JOHN and GILBERT ASPINWALL, Appellants,
against
THOMAS TOUSEY, Appellee.

ENDORSEES of a promissory note against the promisor.

The plaintiffs declared on a promissory note made by the defendant to one *Edward Ryan*, and by him endorsed to them.

In all cases where there is a submission of matters in controversy to arbitrators by bond, whether the submission be made irrevocable or not, either party may revoke such submission before the award be made and published, and by such revocation he annuls all contracts as relative to the submission conditioned in the bond, and leaves the party injured by the revocation to rest entirely upon the penalty of the bond of submission.

The defendant pleaded *non assumpsit* to the declaration, and filed the following plea in set-off.

And for further plea in this behalf, by leave of Court had, &c. the said *Thomas* says, that long before notice of the sale and endorsement of said promissory note, to wit, on the 28th day of *November*, 1785, at *Vergennes* aforesaid, the said *Edward Ryan* was justly indebted to the said *Thomas* in divers large sums of money, for that whereas the said *Ryan* had before that time, to wit, on the 10th day of *April*, 1795, at *Vergennes* aforesaid, by his certain indenture in writing of that date, signed with his hand and sealed with his seal, in consideration of divers large sums of money then and there received of the said *Thomas*, granted, bargained, sold, assigned, transferred and set over to the said *Thomas* his the said *Ryan's* patent right for manufacturing pot and pearl ashes in the State of *Vermont*, and part of the State of *New-York*, and had in and by said indenture, among other things, covenanted to and with the said *Thomas*, that if he the said *Thomas* should be unable to manufacture (according to the method of manufacturing as set forth in the schedule annexed to said *Ryan's* letters patent, as before in said indenture recited) pot-ash, in a furnace constructed as set forth in the schedule in said indenture recited, at the rate of two tons *first sort* pot-ash, in twenty-four hours from good salts of lie, then and in that case every thing in said indenture, obligatory on the part of the said *Thomas*, should be and remain void, and the said *Ryan* should refund all moneys by him received of the said *Thomas*, as by his said indenture, &c. And whereas the said *Thomas*, so having the right of manufacturing pot-ash as aforesaid, did, afterwards, to

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wit, in the spring of the year 1795, manufacture about six tons of pot-ash, according to the said *Ryan's* patent method, and transported the same to the city and port of *New-York*, being a proper market, &c. which pot-ash, by due inspection made, &c. passed as *second sort* of pot-ash, and occasioned a difference or loss of eight pounds *New-York* currency on each ton, equal in the whole to the sum of 120 dollars, current money of this and the *United States*, he the said *Ryan* in consideration thereof, afterwards, to wit, on the same 28th day of *November*, 1795, aforesaid, to wit, at *Vergennes* aforesaid, did engage and promise the said *Thomas*, that the same should be accounted and endorsed on the said *Ryan's* sale of the aforesaid patent right to the said *Thomas*, contained in the indenture aforesaid, and should be deducted from any payments which the said *Thomas* might thereafter have to make to said *Ryan* on account of the said purchased patent right, with six per cent. interest, until said payment should become due; and the said *Thomas* avers, that the aforesaid sum of 120 dollars, with six per cent. interest thereon, accruing and accrued, hath not been accounted or endorsed on said indenture. By reason whereof, &c. The declaration then raises a liability in *Ryan*, and a promise, with subsequent refusal to pay this sum.

The declaration in set-off, contained two other counts of general *indebitatus assumpsit* against *Ryan*, and alleged to be before notice of endorsement, one for money had and received, and the other for money laid out and expended; to the damage of said *Thomas* 300 dollars, which he prays may be offset against the demands of the said *Gilbert* and *John*,

contained in the promissory note aforesaid, agreeably to the statute in such case made and provided.*

* From the organization of the government to the year 1795, the question whether an action could be maintained upon a promissory note in the name of the endorsee, had been much agitated, and in the County Courts opposing decisions had been made. As the State had been peopled principally with emigrants from the other States, every one brought with him local sentiments on the subject, which, as the practice had been different in the parent States, induced a difference of opinion. The legislative will had not been declared by any express statute; but I find during this period, several acts which might seem to countenance the negotiability of promissory notes, more especially the act against counterfeiting and passing bills of public credit, coins, and notes, and to prevent injustice in passing the same, passed *March* 2, 1787, and since repealed, the 7th section of which enacts, "that if any person, society, number of persons, or company within this State, without special authority from the Legislature, shall presume to strike, emit, or put out any bills of credit, or notes, on any fund or credit of any person or persons, society or company, to be used and improved as a general currency or medium of trade, as or in lieu of money, (*other than promissory negotiable notes,*) such person or persons, on conviction," &c. In the year 1795, the Supreme Court of Judicature, at their term in *Windham* County, after solemn argument, decided, that promissory notes made to payee or order, were negotiable, and sustained an action in favour of an endorsee. At their *October* sessions the same year, the General Assembly passed the following act: "An act with respect to the negotiability of notes. Whereas disputes have arisen, whether notes drawn to the payee or order are recoverable in the name of the endorsee? to put an end to which disputes, it is hereby enacted, &c. that from and after the passing of this act, no person shall be holden to answer in an action or suit hereafter to be brought in the name of any person other than the person whose name is in

Hough & Spooner's edit. *Vermont* Stat. p. 40.

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To this declaration in set-off, the plaintiffs pleaded in bar; because they say, that long after the making

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the note or obligation expressed as creditor. Provided always, that this act shall not be construed to prevent any executor or administrator from maintaining a suit upon any obligation given to any person whose estate they administer upon." In the year 1798, the General Assembly passed the act now in force, under which the offset was pleaded, as before notice, as mentioned in the plea in bar. "An act allowing endorsees to maintain actions in their own names. It is hereby enacted, &c. that the endorsee or endorsees of any bill or promissory note for the payment of money to any person or persons, his or their order, or to the bearer, may maintain an action thereon in his, her or their own name or names for the recovery of the money. Provided always, that in all such actions it shall be lawful for the defendant or defendants to plead an offset of all demands proper to be pleaded in offset, which the defendant or defendants may have against the original payee or payees before notice of such endorsement against the endorsee or endorsees; and may also plead or give in evidence on trial of any such action, any matter or thing which would equitably discharge the defendant or defendants in an action brought in the name of the original payee or payees. Section 2. 'Provided also, and it is hereby further enacted, that in all such cases the endorsee or endorsees shall recover no more costs than the original payee or payees would be entitled to recover, had the suit been brought in his, her, or their own name." Section 3. repeals the act of 1795.

It appears, that the dispute respecting the negotiability of promissory notes had arisen in *England*, and had been settled in the same way by act of parliament.

"*Sic canibus catulos similes, sic matribus hædos*
"*Noram: sic parvis componere magna solebam.*" VIRG.

It seems that neither inland bills of exchange or promissory notes were frequent in *England* before the reign of *Charles* II. and for a time after their introduction neither

the promise and undertakings in the said plea of offset mentioned, and above supposed to have been

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were considered *negotiable*. In this respect, however, inland bills of exchange obtained the preference, but promissory notes, although made payable to the promise, *or order*, were not considered by the Court of King's Bench to be negotiable by the custom of merchants, even so late as the year 1702; for that Court decided against the negotiability of a promissory note in the case of *Clerk* v. *Martin*, as reported by Lord *Raymond*, vol. 2. p. 757. where Lord Chief Justice *Holt* took such a decided part against the plaintiff as seems hardly reconcilable with that equanimity so generally and so admirably displayed on the *English* supreme bench. The plaintiff brought an action upon his case against the defendant upon several promises. One count was upon a general *indebitatus assumpsit* for money lent to the defendant. Another count was upon the custom of merchants, as upon a bill of exchange, and showed that the defendant gave a note subscribed by himself, by which he promised to pay —— to the plaintiff *or his order*. Upon *non assumpsit* a verdict was given for the plaintiff; and it was moved in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff, having declared upon it as such, was wrong; but that the proper way in such cases is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it. But it was argued for the plaintiff, that this note being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to *I. S.* or bearer, which he admitted was not a bill of exchange, because it is not assignable nor endorsable by the intent of the subscriber, and consequently not negotiable; and therefore it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable. But here this bill is negotiable; for if it had been endorsed payable to *J. N.*, *J. N.* might have brought his action upon it as upon a bill of exchange, and might have declared upon the custom of mer-

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made, to wit, on the 26th day of *September*, A. D. 1797, the said *Thomas* made, executed, and deli-

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chants. Why, then, should it not be, before such endorsement, a bill of exchange to the plaintiff himself, since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange. That there is no difference in reason between a note which saith, "I promise to pay to *J. S.* or order," &c. and a note which saith, "I pray you to pay to *J. S.* or order," &c. they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he by signing the note, has made himself to that purpose a merchant. 2 *Vent.* 292. *Sarefield* v. *Witherly*, and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants.

See also *Comb.* 45.

Holt, Chief Justice, was *totis viribus* against the action, and said that this note could not be a bill of exchange. That the maintaining of these actions on such notes was innovating upon the rules of the common law, and that it amounted to the setting a new sort of specialty unknown to the common law, and invented in *Lombard-street*, which attempted, in these matters of bills of exchange, to give laws to *Westminster-Hall*. That the continuing to declare upon these notes upon the custom of merchants, proceeded from obstinacy and opinionativeness, since he always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarefield* v. *Witherly*, he said he was not satisfied with the judgment of the King's Bench, and that he advised the bringing a writ of error, and judgment was given *quod querens nil capiat per billam*, &c. by the opinion of the whole court.

At the next session of parliament, the statute of the 3d and 4th of *Anne* recites, "that whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person,

vered to the said *Edward Ryan* his certain bond or writing obligatory, sealed with the seal of the said *Thomas*, and signed with his own proper hand, and ready in Court to be produced, which said bond is in the words, figures, and letters following, to wit:

Know all men by these presents, that I, *Thomas Tousey*, of, &c. am holden and stand firmly bound unto *Edward Ryan*, of, &c. in the penal sum of forty thousand dollars, current money of the *United States*, for the payment of which sum well and truly to be made to the said *Edward*, after the expiration of four years from the date hereof, with interest, I bind myself and my heirs firmly by these presents, sealed with my seal, and dated in the City of *Vergennes* this 26th day of *September*, 1797.

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or his order, any sum of money therein mentioned, are not assignable or endorsable over within the custom of merchants to any other person, and that such person, to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same, and that any person to whom such note shall be assigned, endorsed or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, in substance, that promissory notes, payable to order or bearer, may be assigned and endorsed, and action maintained thereon as on inland bills of exchange." And this act was made perpetual by the act of the 7th year of the same reign. So that the question as to the negotiability of promissory notes may be considered to be put at rest in both countries.....*Reporter.*

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The condition of the above obligation is such, that if the above bounden *Thomas Tousey*, his heirs, executors, or administrators, and every of them, for and on his and their parts and behalf, do and shall well stand to, abide, perform, observe, fulfil and keep the award, order, arbitrament, final end and determination of *Thomas Byrd*, *Samuel Hitchcock*, and *Enoch Woodbridge*, Esqrs. of the City of *Vergennes* aforesaid, arbitrators, indifferently named, elected, and chosen, as well on the part and behalf of the above bounden *Thomas Tousey*, as of the above named *Edward Ryan*, to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of actions, suits, contracts, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages, and demands whatever, both in law or equity, or otherwise, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done, or suffered, by or between the said parties, or either of them, so as the said award, arbitrament, judgment, final end and determination between the said parties, be made in writing under the hands and seals of the said arbitrators, and ready to be delivered to the said parties on or before the first day of *January*, A. D. 1799. And it is further agreed by and between the parties, that the said arbitrators shall take under their consideration, and their award thereon make between the parties, a certain demand or bond which the said *Ryan* hath against *Justus Bellamy*, of the City of *Vergennes* aforesaid, which demand or obligation is signed by the said *Justus* and

Thomas, dated the 10th day of *April*, 1795, which said obligation was executed to the said *Ryan* by the said *Bellamy* and *Tousey*, for the exclusive right of manufacturing pot-ash in the State of *Vermont* and part of the State of *New-York*, according to his the said *Ryan's* patent method, as if the said demand or obligation was between the said *Tousey* and the said *Ryan* solely; and the said *Justus Bellamy* is hereby discharged from the said obligation. Now then it is the true intent and meaning of the parties, that if the said *Tousey* stand to, abide by, and perform the award of the said arbitrators in all its parts, the foregoing obligation to be void, otherwise to remain in full force and virtue. And it is hereby further agreed by and between the parties to the above obligation, that if the said *Thomas Tousey* absents himself, or neglects to attend before the said arbitrators before the first day of *February*, A. D. 1799, (death, sickness, or other unforeseen accidents excepted,) so that the above matters of arbitration are not brought to a final end and determination on or before that day, then, in addition to the subjecting himself to the above penalty, the said *Tousey* hereby relinquishes all claims and demands, or ground of action against the said *Edward Ryan*, as though determined by the said *Thomas Byrd*, *Samuel Hitchcock*, and *Enoch Woodbridge*, Esquires, the above-mentioned arbitrators, or others appointed by said parties in case of the non-attendance of the said arbitrators, which said arbitrators are to meet in the City of *Vergennes* aforesaid, to arbitrate, decide, and award upon the above differences between the parties. In witness, &c. And for that the said *Edward Ryan*, on the same day and year of the date of said bond or writing obligatory,

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executed and delivered to the said *Thomas* his bond or writing obligatory, thereby submitting the matters in controversy mentioned in the first above recited bond, to the arbitrament, final end, and determination of the said *Thomas Byrd*, *Samuel Hitchcock*, and *Enoch Woodbridge*, Esquires, to be determined by said arbitrators in manner and form as mentioned in the aforesaid bond. And it was then and there agreed by said *Thomas*, as appears by said first recited bond or writing obligatory, that if the said *Thomas* should absent himself, or neglect to attend before said arbitrators, before the first day of *February*, A. D. 1799, (death, sickness, and other unforeseen accidents excepted,) so that the aforesaid matters of arbitration cannot be brought to a final end and determination, on or before the said first day of *February*, 1799, then, in addition to subjecting himself to the aforesaid penalty, the said *Thomas* did relinquish all claims and demands against the said *Edward Ryan*. And the said *Edward* in fact says, that the said *Thomas* did absent himself, and neglect to attend before said arbitrators, without the intervention of death, sickness, or unforeseen accident, and did in fact revoke said arbitrament before the said first day of *February*, A. D. 1799, so that said arbitrators could not have ever made their award upon said matters of difference; all which the said *Edward Ryan* is here ready to verify and prove in manner and form as the Court here shall direct. Wherefore he prays judgment, &c.

To this plea in bar the defendant *Tousey* demurred.

The question made was, whether the conditional release or relinquishment by *Tousey* of all claims or

demands or ground of action against *Ryan*, mentioned in the submission, could operate upon the breach of it, after the revocation of the submission by *Tousey*.

It was contended by the counsel for the defendant, demurrant, that it could not. That *majus continet in se minus*. That all provisionary articles in the submission were but parts of the contract of submission. That by the defendant's revocation he annulled the whole submission. That if the plaintiff has been injured by the revocation he may recover for the injury upon the bond.

That the condition the breach of which is charged upon the defendant in the plea in bar, is so vague, that if the Court should even consider that the revocation did not annul it, that it could never be determined whether he had broken it or not. The words are, " That if the said *Tousey* absents himself, &c. so that, &c. the said *Tousey* relinquishes all claims and demands and ground of action against the said *Edward Ryan*, as though *determined* by said *Thomas Byrd*," &c. *How determined?*

Further, the condition contemplates a meeting of the arbitrators, and the wilful absence of *Tousey* after such meeting. " So that the above matters of arbitration are not brought to a final end and determination on or before the first day of *February*, 1799." But the condition, even by a fair construction of the submission, was not to be in force, and consequently could not be broken unless the arbitrators met; and it seems there existed a doubt whether the gentlemen named as arbitrators would meet, and provision is made, in case of their declining, for the ap-

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pointment of others by the parties; and it does not appear by the plea in bar, whether these gentlemen accepted their appointment, or met, or whether others were appointed in their stead; for if they declined the trust, or accepted it and did not convene, or declined and no others were appointed, the non-attendance of *Tousey* was no breach of the condition.

By the plaintiff's counsel, the right to revoke the submission was conceded, and that *generally;* in such case the party must seek his remedy on the bond. But it was insisted, that here was a contract independent of the submission, and in its nature not to be annulled by the revocation of the submission. That the whole bond of submission had concluded in the usual form. "That if the said *Tousey* should stand to, abide by, and perform the award of the arbitrators in all its parts, then the foregoing obligation to be void, otherwise to remain in full force and virtue." That then the parties inserted on the same paper a new and independent contract, accompanied with a condition, the breach of which had nothing to do with the penalty of the bond, but for which an extrinsic penalty was provided. The condition was, that *Tousey* should not absent himself, or neglect to attend before the arbitrators, (death, sickness, or other unforeseen accidents, excepted,) so that the above matters of arbitration could not be brought to a final end and determination before the first day of *February*, 1799. The penalty appropriated expressly to the breach of this condition was, "that *Tousey* should relinquish all claims and demands and grounds of action against the said *Edward Ryan*, as though determined by the said *Thomas Byrd*," &c. To say

that this is vague, is trifling. The claims, demands, and grounds of action are to be relinquished by *Tousey* in the same manner as if *determined* by the arbitrators. Can this be understood in any other manner than as if determined *against him?* for there could be no breach if determined in his favour.

To insist that the revocation of the submission can annul this contract, would be to insist on the annulling of a contract, contrary to the original intent of the contracting parties. The object of Courts of Justice is to carry the intention of parties into effect. The intent of the parties to this contract must have been, that it should survive and be binding after the revocation of the submission; for the penalty of the contract could only attach by the *defeat* of the intended award. The words of the contract are, "So that the above matters of arbitration are not brought to a final end and determination" by a day specified; that is, so that no award should take place through the laches of *Tousey*. The term "*revocation*" is not expressly used. But the condition goes to all possible modes of preventing the award by *Tousey*, excepting by absence occasioned by death, sickness, or inevitable accident, which are traversed.

Although the contract contemplates a meeting of the arbitrators, and provides for the appointment of others, in case they should decline the trust; and although it is conceded, that if no revocation had been made, and the arbitrators had not met, or had declined their appointment, and others had not been appointed by the parties, there would have been no breach in *Tousey*, yet when, by his revocation of the submission, he absolutely prevented their meeting, and devested them of all powers as arbitrators, he is

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estopped from saying there is no breach; for the law will not suffer a person to take advantage of his own wrong. In the case of tender of money, where it is necessary to count it, yet if the payee absolutely refuses to receive it, he who tenders is excused from producing and counting the coin, and the payee is estopped from taking advantage of these defects in the tender, which would otherwise be fatal *by his own act.*

Per Curiam. The general principle is, that either of the parties to a submission to arbitrators by deed or bond, has a right (at any time before the award is made and published) to revoke, and if any injury is sustained by the opposite party, he must seek his remedy on the bond.

An attempt is made to take this case out of the general rule, by representing that the condition in the bond of submission, that in case *Tousey*, the defendant, should be absent, or neglect to attend before the arbitrators, so that the award could not be made by a certain day, inevitable accidents excepted, he should relinquish all claims, &c. against the plaintiff, as a contract independent of the bond of submission, and not annulled by the revocation of the submission. The Court consider, that this condition or provision is an inseparable part of the bond of submission, and must be operated upon by the revocation to the same extent as any other condition in the bond of submission. It is true it is inserted under the words commonly concluding a bond; but it is intimately connected with the subject matter of the bond by the expression, " and it is hereby further agreed." The breach of it has not subjected, as has been

urged, to an independent extrinsic penalty, but is otherwise expressly set forth, that in addition to subjecting himself to the above penalty, the said *Tousey* shall relinquish, &c.

But the Court will not enlarge upon these minutiæ, or certain other defects in the plea in bar; as the Court consider that it is beneficial to have it well understood that this case is decided upon a general principle. That in all cases where there is a submission of matters in controversy to arbitrators by deed or bond, whether the submission be made irrevocable or not, either party may revoke such submission before the award made and published, and by such revocation he annuls all contracts relative to the submission conditioned in the bond, and leaves the party injured by such revocation to rest solely for redress upon the penalty of the bond of submission.

Let judgment be entered, that the plaintiff's plea in bar to the defendant's declaration in set-off, is insufficient.

Amos Marsh, for the plaintiff.
Samuel Miller and *Josias Smith*, for the defendant.

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JOHN TAYLOR *against* ABNER HOLCOMB.

The deposition of a former town clerk may be admitted to show his general mode of transacting his official business.

EJECTMENT. Issue of fact to the Court.* The plaintiff demanded seisin and possession of fifty-two acres and a half of land in *Panton*, and derived his title under a deed from *Abraham Ives*, sheriff, as collector of a state tax of ten shillings on each hundred acres of land, passed *March* 9, 1784.

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* This practice of joining issue of fact to the Court is provided for by the 72d section of the judiciary act, *Vermont* Stat. vol. I. p. 83. which enacts, "that the several Courts in this State shall have power to try any issue of fact referred to them by agreement of the parties in any suit pending before them." This practice has been pursued in the respectable State of *Connecticut* ever since the year 1672, as we learn from a note, p. 36. in *Hudson & Goodwin's* edition of the public statute law of that State, published in 1808, a compilation which does high honour to the acumen and industry of Messrs. *Treadwell, Perkins & Day*, the committee appointed by the Legislature to superintend the impression.

However this mode of joining issue to the *bench*, in matters most commonly tried by the *Jury*, may appear in theory to those inexperienced in the practice, we certainly find it to be extremely beneficial. Cases frequently happen where it is necessary to ascertain the facts, and when found by a Jury, the law applicable to them must be afterwards decided by the Court on special verdict, or on motion for new trial or arrest of judgment: this creates delay, and enhances costs. Besides, cases will sometimes present where the facts and the law are so intimately blended as to render it difficult for the most acute pleader so to distinguish as to safely rest his client's cause upon the critical ground of special pleading. In all such cases, when the issue of fact is joined by agreement of parties to the Court, the Court have the whole subject before them, and can apply the law as the facts arise.

The deed was dated the 7th of *April*, 1784, acknowledged before a magistrate the succeeding day, received on file in the County clerk's office, *May* 20, 1784, and recorded *February* 6, 1786.

As the act had provided that the record should be made in the town clerk's office, if the town wherein the lands lay was organized, and as the town of *Panton* had been organized eleven days before the date of the collector's deed, it was also recorded in the town clerk's office of *Panton*, and the following certificate endorsed upon it:

Further, by this mode of trial an inconvenience is in a great measure avoided, which frequently attends the trial by Jury. Questions respecting the admissibility of testimony may arise, which it is the Court's prerogative to decide, and during the arguments the Jury sit idle and in suspense, and sometimes from the eloquence of the advocates, imbibe incorrect opinions, and suffer them imperceptibly to influence their verdict; and as these questions are often novel, and so nice that it requires time and deliberation to form a correct judgment in the most discerning Judges, Courts are frequently obliged to adjourn for consultation, and not unfrequently to admit or reject the doubtful testimony, and reserve their opinion of the correctness of a hasty decision to future consideration. Most of these inconveniences, so irksome to Jurors, expensive to suitors, and obstructive to the bench, are avoided by this mode of trial. The Judges, unencumbered by the attendance of the Jury, can hear and decide deliberately, can admit objected testimony with or without argument, can adjourn the cause from time to time for further argument or additional testimony, and when they result in judgment, have the whole subject, as to law and fact before them, with all its bearings and nice dependencies. At the same time, as all this is effected by *consent* of parties, the trial by Jury, that inestimable privilege of *Englishmen* and their descendants, is not impugned....*Reporter*.

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Town Clerk's Office, *Panton*, 2d of *October*, 1787. *The within deed received for record*, and recorded in the town records, liber —, folio —.

Attest, *Noah Ferris*, Town Clerk.

Fay's edit. of the Laws, Appendix, p. 38.

The latter clause of the 4th section of the act enacts, "that whenever any lands of any proprietors or land owners shall be thus sold by virtue of this act, the collector of such tax or taxes shall make and give to the purchaser a deed of warranty thereof, signing said deed as collector of the respective tax on which said land was sold; and if the said proprietor or proprietors or land owners, shall not, within twelve months next after such deed is lodged in the town clerk's office, or for want thereof in the County clerk's office, or proprietor's clerk's office, pay and satisfy or tender to such purchaser the purchase-money, together with all costs and charges, (including the expense of surveying such lands, if any be made,) or deposit the same in the office where the deed is lodged, and twelve per cent. interest thereon arising in gold or silver, the same shall be recorded, and thereupon the title be confirmed to and in such purchaser, his heirs and assigns, to all intents and purposes for ever."

The counsel for the plaintiff now offered to show by the deposition of *Noah Ferris*, late town clerk of *Panton*, that the deed had been lodged in his office twelve months before it had been recorded. To explain his certificate of the record,

The substance of the deposition was, that whilst the deponent was town clerk of *Panton*, it was his constant practice when he received a deed for record,

to endorse upon it, "*Town Clerk's Office*, (with the date,) *the within deed received for record*," which operated as a filing of the deed; and when the record was completed, he added, "*and recorded*, book ---, page ---," attesting it with his official signature. That the collector's deed had been in fact received by him, *October* 2d, 1787, when he made the first section of the certificate, so far as *received for record*. That the deed was then kept on file until the 3d of *October*, 1788, when it was recorded, and he added to the minute, "and recorded," &c. and attested it.

The defendant excepted to the admission of this deposition, insisting, that it went to impeach the record. That the suffering a public officer to testify to any facts controverting the face of his record, would be against law, and of dangerous consequence.

Sed per Curiam. The deposition must be admitted. The testimony does not go to controvert the record, but merely to explain the town clerk's mode of doing his official business *generally*. The Court would not suffer a recording officer to impeach his record in *a particular instance*. But they consider there is a wide distinction between *this* and suffering him to explain his *general mode* of transacting his official business. The Court are the more confirmed in this opinion from a knowledge that the same erroneous mode of certifying the record of sheriff *Ives's* deeds, has prevailed generally throughout the district in which he vended lands as collector. When a private deed was presented for record, it had been common for the town clerks throughout the State, to endorse upon it their official caption with the date, and

Taylor v. Holcomb.

when received, without any signature, this operating as a mere minute, until the deed was recorded, and then to enlarge the minute by adding, *and recorded*, folio —, liber —, as in the present instance, and this being attested and signed, formed the certificate of the record, and was entered in the record book as such; and as the recording in such case ought to bear date from the day the deed was presented for record, no inconvenience had arisen from this practice in case of deeds executed by one individual to another. And this practice led the town clerks to apply the practice in case of the collector's deeds under the ten shilling tax, without adverting to the act which required that the deed should be lodged in the office twelve months before it should be recorded.

If no parol evidence can be let in to show how the fact was in cases of collectors' deeds, it would give a dangerous shock to land titles, not merely to the immediate grantees of *this* collector, whom the Court might not be inclined to favour, but to many honest men who have purchased under them, and perhaps most of them without covenants of warranty or seisin.

Let the deposition be read.

Judgment for the plaintiff.

—— *Chipman*, for plaintiff.

Amos Marsh and *Josias Smith*, for defendant.

NATHANIEL and LUCRETIA RICH, Appellants,
against
ALEXANDER TRIMBLE, Appellee.

DECLARATION in case upon a special promise made to the plaintiff *Lucretia* when sole.

The plaintiffs declare, that the said *Lucretia*, when sole, had an illegitimate child born of her body, of which the defendant was the father, and by the law of nature and the land was obligated to aid and assist in its maintenance; in consideration whereof he promised the said *Lucretia* when sole, to wit, on the 5th of *March*, 1799, to pay her at the rate of one dollar per week, for each and every week that she should nurse, nurture, tend, support, maintain and take charge of said child during its infancy; that in consideration thereof she nursed, &c. and took charge of said child during its infancy, two hundred weeks, from, &c. to, &c. and then alleges an intermarriage between the plaintiff, and that the right of action hath accrued to both of them, &c.

There were also two general counts, one for 500 dollars, money had and received, and the other for the same sum for work and labour done.

The defendant pleaded in bar a release of the demand in writing for the consideration and receipt of 30 dollars, made on the 3d of *September*, 1800, by the plaintiff *Lucretia* when sole.

To this plea there was a traverse of the release, and issue to the country.

The release was offered in evidence by the de

The signature of a party to a release cannot be proved by comparison of hand-writings if there be *a subscribing witness*, even though the witness resides *without* the State; for if the place of his residence be known, and he lives within a reasonable distance from the place of trial, his deposition should be taken.

Rich v. Trimble.

fendant's counsel, who offered to show its execution by a comparison of hand-writing.

Strong, for the plaintiffs, objected, that there was a subscribing witness, and relied on the case of *Stephen Pearl* v. *Ebenezer Allen*, *Chittenden* County, *January* term, A. D. 1800.

Vide *Vermont Rep.* vol. 1. p. 4.

Harrington, for defendant. We consider that case not in point. The objection there was, that the subscribing witness was *within process of the Court*, and that decision rested on this ground. But the subscribing witness to this release lives on the shores of Lake *George*, within the State of *New-York*, *beyond the process of the Court.*

TYLER, Assistant Judge. The State statutes provide for the taking the depositions of witnesses out of the State, to be used in the Judicial Courts within it, and the deposition of the subscribing witness might have been taken in this case.

The term "*process*," as commonly applied, intends that proceeding by which a party is called into Court, but it has a more enlarged signification, and includes all the proceedings of the Court from the beginning to the end of a suit, and is defined in the books, "*processus; a procedendo ab initio usque ad finem.*" And in this view all proceedings which may be had to bring testimony into Court, whether *viva voce* or in writing, may be considered to be within the process of the Court.

JACOB, Assistant Judge. I agree with my brother TYLER. There are two modes of obtaining

testimony to be used in Court; one by bringing the witness into Court by process of *subpœna ad testificandum*, or in case of wilful neglect of appearance by *capias;* the other by taking the deposition of the witness, by the aid of government if the deponent lives within the State, and upon the party's own aplication if the witness resides in another State or dominion; but when the deposition is returned into Court, it is incorporated with the proceedings or process of the Court. I am therefore for not admitting the execution of the alleged release to be proved by comparison of hand-writing, as within the case of *Pearl* v. *Allen.*

Chief Judge. Whether the case cited is in point, and the rejection of the comparison of hand-writing in this case can be included in that case or not, I am against the admission of comparison of hand-writings, to show the execution of this release. I consider that our statute has made ample provision for the taking of depositions in civil causes. That when a question arises whether the presence or the deposition of a witness shall be supplied by a comparison of hand-writing, or other lesser evidence, in case the witness lives beyond the territorial lines of the State, the inquiry must be, whether the place of his residence is known with precision, and whether it is within such reasonable distance as that the party might procure his deposition? In this case I consider, that the place of residence of the subscribing witness being ascertained, and within reasonable distance, the defendant might readily have obtained his deposition, and therefore I agree with the assistant Judges, that a comparison of hand-writing to prove

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the plaintiff *Lucretia's* signature to the release, cannot be admitted.

Evidence not admitted.

Verdict for plaintiffs, 200 dollars.

Samuel Miller and *Moses Strong*, for plaintiffs.
W. C. Harrington and *Amos Marsh*, for defendant.

STATE *against* PETER WHITE.

A bailee of goods, who has the qualified possession of them, is guilty of larceny in privately eloigning and converting them.

INDICTMENT for larceny.

The indictment charged the defendant, that at *Middlebury*, on the 25th of *December*, A. D. 1802, *vi et armis*, he stole, took, and carried away seven yards of muslin, a portmanteau, and sundry other chattels, principally tin ware, of the proper goods and chattels of *Thomas Clerk*, then and there being found, &c. *contra formam statuti.*

Trial by Jury.

It appeared in evidence, that *Thomas Clerk* was a tin manufacturer, and had hired the prisoner to work at his trade as a journeyman; that *Clerk* went a journey, and left his shop in the care of the defendant, under the superintendence of his brother *Samuel Clerk*, who on account of the prisoner's ill conduct in being frequently intoxicated in his brother's absence, dismissed him and shut up the shop. On *Thomas Clerk's* return the goods were discovered to be missing, the prisoner was pursued, overtaken in *Cornwall*, and the goods found in his custody.

The defence attempted to be made was, that the eloigning the goods was only a breach of trust in the prisoner; that he could be no trespasser in the eloigning, he having received the goods by consent of the owner, and if no trespass in taking, there could be no *theft*, as without a tortious taking there can be no larceny.

TYLER, Assistant Judge. After the repeated decisions of the Court upon this point, the present defence is certainly unexpected.

So long since as the year 1530, this doctrine has been abrogated in *England* by the statute of *Henry* VIII. c. 7. which in the preamble recites, "That divers persons had upon confidence and trust delivered unto their servants their caskets and other jewels, money, goods and chattels, safely to keep to the use of the said masters, &c. and that they had afterwards withdrawn themselves, and had gone away with the same or part thereof, to their own use, and *that it was doubtful whether this were felony or not at common law:*" and then enacts, "that all and singular such servants, (being of the age of eighteen, and not apprentices,) to whom any such caskets, &c. shall be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with the said caskets, &c. or any part thereof, with intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence in him or them put by his or their said masters or mistresses, or else being in the service of his said master or mistress, without their assent or command, he embezzle the same caskets, &c. or any part thereof, or

State v. White.

otherwise convert the same to his own use, with like purpose, &c. if the caskets, &c. shall be of the value of 40*s.* or above, then the same false, fraudulent and untrue act or demeanor from thenceforth shall be deemed and adjudged felony." And although, through the peculiar regard which the *English* Judges pay to the letter of the statutes, this act was not extended to journeymen embezzling the goods of their masters, yet since the making of that statute it has ever been considered, that a journeymen or servant who takes his master's goods with an intent to steal them, is guilty of felony at common law.

A distinction in more modern times seems to be made between delivering the *property*, or the qualified *possession, being the care of goods*, to any one. If the *property be actually delivered*, there can indeed be no tortious taking; but if the mere qualified possession *or care* of the goods is only delivered, there may be a tortious taking, and it is committed the instant the bailee privily converts the goods to a purpose not comprehended in the implied or special contract on which the qualified possession or care of the goods was made.

It appears to me, that if this defence is pursued, the sole question to the Jury must be, whether the prisoner took the goods with a design to steal them, which, indeed, from the goods being found in his custody on his apprehension while on flight, can scarcely be questioned.

Jacob, Assistant Judge. It appears to me, that if the doctrine that the eloigning goods by a bailee is not a larceny, but a breach of trust, were well founded, it could not apply in this case, for it is in evidence

that the prisoner had been discharged from his master's service by the brother, who was his agent to superintend his business in his absence. Upon the prisoner's discharge, all right of possession had then ceased in the prisoner.

Chief Judge. If the prisoner's counsel insist, let this defence be urged to the Jury, and the Court will state the law as it is. In a criminal prosecution I had rather err through *indulgence* than *rigour*.

Miller, counsel for the prisoner, said, he should not press the defence any further, as he had learned from the State Attorney that he had witnesses in Court to prove the taking of some of the chattels mentioned in the indictment, which were not delivered by the owner to the charge of the prisoner.

Verdict guilty.

Daniel Chipman, for the State.
Samuel Miller, for the prisoner.

Forbes v. Hamilton.

CHARLES FORBES, Appellee,
against
ARTHUR HAMILTON, Appellant.

It is not necessary that there should be a note or memorandum in writing of a contract to cut down and clear away trees on the plaintiff's farm; for the 4th section of the act regulating the conveyances of real estate, and for the prevention of frauds therein, is confined to the transfer of real estate, and the words in this section, "*or any interest therein, or concerning them,*" do not extend the statute to contracts respecting labour on lands.

GENERAL *indebitatus assumpsit.*

The plaintiff declared, that the defendant, on the 1st of *January*, 1800, was indebted to him in the sum of 100 dollars for work and labour done at his special instance and request, on his farm in *Bridport*, &c.

Second count. Same sum for money had and received to the plaintiff's use.

General issue joined to the country.

The plaintiff offered to show in evidence, in support of the first count of his declaration, a *parol* contract made between the parties, by which the plaintiff was to cut down and clear away the trees standing and growing on a certain six acres of land, part and parcel of the defendant's farm.

Objected by the defendant's counsel, that the plaintiff cannot be admitted to show any *parol contract concerning lands*, but that the statute of frauds, as relative to lands, had made it necessary that the contract should be in *writing*.

Vermont Stat. vol. 1. p. 189.

He read the 4th section of the "act regulating the conveyances of real estates, and for the prevention of frauds therein"—"that no action shall be maintained upon any agreement hereafter to be made for the sale of lands, tenements or hereditaments, or any interests therein, *or concerning them;* unless the agreement upon which such action shall be brought,

or some memorandum thereof, be in writing and signed by the parties to be charged therewith, or signed by some other person thereunto lawfully authorized, by writing;" and insisted, that although the title of the act might seem to restrict its operation to contracts by which real estate is conveyed, yet the expression in the section cited, "*or concerning them,*" extended the purview of the act to all agreements any ways relating to land.

Sed per Curiam. The object of the act is set forth in the preamble, and is too plain to admit of argument. "Whereas it is necessary, to prevent uncertainty, fraud and perjury, *in transferring real estates*, that a mode therefore should be established, easy, certain and notorious, therefore," &c. And this object is not extended by the expression relied upon, "No action shall be maintained upon any agreement hereafter to be made for the sale of lands, &c. or *any interest therein, or concerning them;*" that is, concerning the sale of lands, or any interest therein, which includes the various tenures by which lands may be holden. In which cases some memorandum, as described in the act, must be made, or an action cannot be maintained on the agreement. To give the act the construction contended for, would be to destroy the right of recovery of almost every labourer at harvesting or mowing, &c. which generally and almost universally rest on parol contracts.

Let the evidence be admitted.

Amos Marsh, for the plaintiff.
—— ——, for defendant.

Brush v. Robinson and another.

ALEXANDER BRUSH, Assignee of the Sheriff, Appellant,

against

SILAS ROBINSON and another, Appellees.

The certificate of a Judge of the County Court and Justice of the Peace prescribed in the act entitled, an act relative to gaols and gaolers, and for the relief of persons imprisoned therein, passed *March* 9, 1797, delivered to a prisoner admitted to the liberties of the prison, is a sufficient bar to an action brought by the sheriff or his assignee upon the bail-bond, and escape assigned as a breach without setting forth other than substantially and as inducement, the mesne process. That all exceptions to such process must be taken before the Court holden by the Judge and Justice. That the Supreme and County Courts cannot judge over the Court of Gaol Delivery, as it is vulgarly called, where the process is merely *voidable*, but only where it is *void ab initio*.

THE plaintiff declared upon a bail-bond executed by the defendants on the 21st of *March*, 1800, as sureties to *Charles Follet*, for the liberties of the prison, to the sheriff of *Bennington* County, and by him assigned to the plaintiff, the original creditor; and then assigned the escape of *Follet* in breach of the bond.

The defendants pleaded in bar (*first reciting the process in substance*) the following certificate, to wit:

State of Vermont.

Bennington County, ss. To all people to whom these presents shall come, greeting.

Whereas *Charles Follet*, a prisoner in the common gaol in *Bennington*, in the County of *Bennington*, on an execution at the suit of *Alexander Brush*, of *Vergennes*, in the County of *Addison*, for the sum of fifty-two dollars and fifty cents damages on a promissory note, and seven dollars twenty-five cents costs of suit, with twenty-five cents more for said writ of execution, signed by *Thomas Byrd*, Esquire, Justice of the Peace, dated at *Vergennes* the 25th day of *January*, A. D. 1800, has this day taken the oath prescribed in an act entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned

therein, the said *Alexander Brush* being duly notified did not attend, and in our opinion the said *Charles Follet* ought to be discharged.

Witness our hands at *Bennington*, in the County of *Bennington*, this 19th day of *August*, 1800.

Solomon Wright, Assistant Judge of the County Court.

Ephraim Smith, Just. Pacis.

The plaintiff prayed *oyer* of the record of the process, which was read to him, and then demurred to the plea, and took several exceptions to the process of the Judge and Justice's Court. After an elaborate argument, especially upon the operative force of such certificate, the Court adjourned the cause to the next stated term to advise; and at the *January* term, 1804, of this County, the Chief Judge pronounced the unanimous opinion of the bench:—

That the certificate of a Judge of the County Court and Justice of the Peace, prescribed in the act entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned therein, passed *March* the 9th, A. D. 1797, delivered to a prisoner admitted to the liberties of the prison, is a sufficient bar to an action brought by the sheriff or his assignee upon the bail-bond, and escape assigned as a breach, without setting forth other than substantially and as inducement, the mesne process. That all exceptions to such process must be taken before the Court holden by the Judge and Justice. That the Supreme and County Courts cannot judge over the Court of Gaol Delivery, as it is vulgarly called, where the

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process is merely *voidable*, but only where it is *void ab initio*.

Judgment, that plea in bar is sufficient.

This decision has not been since shaken.*

Daniel Chipman and *Amos Marsh*, for plaintiff.
Lott Hall, for defendant.

PHILIP SMITH and SOLOMON BARNUM
against
JAMES FORBES.

Decision on the mode of pleading to a declaration for betterments, filed under the act of *November* 5, A. D. 1800.

CASE. Declaration for betterments,† filed *January* term, A. D. 1801.

The plaintiffs declared, that on the 24th of *May*, 1793, they purchased by deed a title to Lot No. 31.

* Vide *ante*, this volume, page 221. *Zachariah Childs*, Assignee of *Rankin*, sheriff, v. *James Morse* and *Levi Osgood*.

Vermont Stat. vol. 1. p. 209.

† The above declaration was filed under an act, entitled, an act for the purpose of regulating suits respecting landed property, and directing the mode of proceeding therein, passed *November* 5, A. D. 1800.

" Preamble. Whereas many persons have purchased supposed titles to lands within this State, and have taken possession of such lands under such supposed titles, and have made large improvements on the same, who at the time of purchasing supposed such titles to be good and valid in law; and whereas many of such titles may prove defective by loss of re-

in the third division in the town of *Shoreham*, drawn to the original right of *James Forbes*, junior, supposing at the time of purchase, such title to be good and valid in law; that they entered into and took possession of the land on the day of the date of the deed, and have made large improvements on the same, (setting forth the improvements particularly,) to the amount of 500 dollars. That the now de-

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cords, the neglect or laches of others in the chain of title, or from other causes, and who, if the strict rules of the common law be attended to, may be turned off from their possessions and improvements on such lands so by them made at great expense, without any compensation or rewards for such *betterments*.

"Sect. 1. It is hereby enacted, &c. That when any person or persons in the actual possession or improvement of lands within this State, who had purchased them, or those under whom they hold had purchased a title to said lands, supposing, at the time of such purchase, such title to be good in fee, and having, in consequence of such purchase, entered and made improvements upon such lands, and shall or have been prosecuted or sued for the recovery of such lands before any Court by action of ejectment, or any other real or possessory action, and judgment shall be hereafter rendered against such person or persons in possession as aforesaid, such person or persons, against whom judgment shall thus be finally given, shall have right by action to recover of the person or persons in whom the legal title shall be found by such judgment, such sum or sums of money as shall be found on the trial of such action, that he, she, or they, or those under whom they hold, have made the lands so described in the plaintiff's declaration better or of more value by such betterments than it otherwise would have been, had no such improvements been made thereon; and the mode of process shall be, that the recoveree or recoverees in such action as aforesaid, shall, within forty-eight hours after such judgment, or during the sitting of the Court in which

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fendant instituted an action of ejectment against them, (setting forth the proceedings in ejectment,) and at the term of the Supreme Court of Judicature, *January*, A. D. 1801, he recovered judgment final against them for the possession of the premises; for the recovery of which, &c.

To this declaration the defendant put in the following plea in bar.

First. That the plaintiffs have not possessed and improved said land in said declaration mentioned, ever since the 24th of *May*, 1793.

Secondly. Nor have the plaintiffs made the said lot of land better and of more value by their supposed betterments and improvements on the same, than it otherwise would have been if no such improvements or betterments had been made thereon, and of this he puts himself on the country.

Objected by the plaintiffs, that this plea is double.

Sed per Curiam. The statute under which the declaration has been filed is a creature of the Legislature *sui generis*, applying a remedy to an injury peculiar to the settlement of lands in a new country,

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such judgment is had, file a declaration in an action of the case against the recoveror or recoverors for so much money as the estate is made better as aforesaid, in the clerk's office of the Court in which such judgment was obtained, which shall be sufficient notice to such recoveror or recoverors to appear and defend in such action at the next session of the said Court; and the Court, on the entry of such action, shall order all proceedings staid on the first action, until the action so filed shall be determined," &c.

and cannot be made subject to any strict rules of pleading. It seems the Legislature have so considered it, by the provision in the second section, "that so often as judgment shall be rendered on demurrer, or any plea in abatement in favour of the defendant or defendants in such action for betterments, the plaintiff or plaintiffs, within twenty-four hours after such judgment, or during the sitting of the Court, shall have liberty to file another declaration for the purposes intended by this act."

It may, however, be observed, that although this plea is very unskilfully drafted, and seems to traverse two distinct points, yet in essence it only goes to one, to wit, negating the plaintiffs' having made the land better since they went into possession in the year 1793, as set forth in the declaration.

This is the first instance in which the Court have ever heard any objections to a plea until after joinder in demurrer; but as the practice under this act has not been well established, they were inclined to indulge the parties. Let the plaintiffs now elect either to enter a formal demurrer to the plea, and risk the decision of the Court, or to join issue.

The plaintiffs joined issue, and had leave to enter a nonsuit on trial.

Chipman and *A. Marsh*, for plaintiffs.
Samuel Miller and *Moses Strong*, for defendant.

Woodbridge v. Austin.

ENOCH WOODBRIDGE, Appellant,
against
APOLLOS AUSTIN, Appellee.

When a demand is barred by the existing laws of a foreign country, where the contract was made, it cannot be revived by transferring it to an inhabitant of this State.

CASE on a promissory note, endorsee against promisor, with plea of set-off.

The plaintiff declared upon a promissory note, dated at *Quebec*, *November* 1, 1790, made by the defendant to *Thomas Aylwin*, or order, for the sum of 251*l.* 11*s.* 9*d.* *Halifax* currency, payable on the 13th of *June* following. That since the decease of *Aylwin*, to wit, on the 22d day of *February*, 1793, the contents being then due and unpaid, *John William Woolsey*, curator on the estate of *Aylwin*, appointed and authorized by the laws of the *British* Province of *Lower Canada*, for a valuable consideration by his endorsement under his hand made, ordered the contents to be paid to the plaintiff, of which the defendant had notice, &c. and therefore, &c.

Writ dated 17th of *February*, 1794.

To this declaration the defendant pleaded the general issue, (which was joined by the plaintiff,) and filed a declaration in set-off, protesting that the note above declared upon was and is the property of *John W. Woolsey*, in his capacity of curator on the estate of *Thomas Aylwin*, and that *J. W. Woolsey* endorsed the same to the plaintiff in trust to be collected for the use and benefit of *Aylwin's* estate; and then declares, that *Thomas Aylwin*, in his life-time, to wit, on the 14th of *November*, 1789, at *Quebec*, in the *British* Province of *Lower Canada*, made his certain promissory note of that date to *Simeon Frazer* and *John Young*, merchants, trading in company under

the name and firm of *Frazer & Young*, by which he promised to pay them or order, 400*l. Halifax* currency, with interest, on the first day of *June* then next following. That on the 14th of *November*, 1789, the contents of the same note being fully due and unpaid, the said *Frazer & Young*, for a valuable consideration, by their certain endorsement on the same note in their hand-writing by one of the said copartners in the name of said firm made, ordered the contents to be paid to the defendant, of which the said *Aylwin* in his life-time had due notice, and likewise the said *J. W. Woolsey*, in his capacity of curator as aforesaid, since the said *Aylwin's* decease. Then raises the liability and consequent promise in the usual form, and prays that the contents of the same note may be set off against the plaintiff's demand.

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To this declaration in set-off, the plaintiff pleaded *non assumpsit*, with a counter *protestando*, and issue joined.

It was conceded by the defendant, that he made the note declared upon; but he called upon the plaintiff to show that his endorsor was curator to the estate of *Aylwin* the intestate, and as such had a legal right to endorse the note declared upon.

Et per Curiam. This is not a common endorsement by the custom of merchants. The endorsee's interest in the note must be shown to entitle him to a recovery, and this cannot be shown but by showing an interest in it, and a right to transfer such interest in the endorsor. The declaration alleges no interest

Where a promissory note is not negotiated by the custom of merchants, the endorsee's interest in the note must be made to appear, and the particular power of the endorsor must be shown.

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which *Woolsey* had in the note, excepting what is derived to him by operation of law, as curator or administrator of the payee's estate. It is incumbent on the plaintiff to show that *J. W. Woolsey* was curator at the time of the endorsement, and as such that he had power to endorse promissory notes made to his intestate as incident to his trust.

The plaintiff now exhibited a copy of the proceedings of two of the Judges of the Court of Common Pleas of the Province of *Lower Canada*, certified by the Clerk of the Court, by which it appeared, that *J. W. Woolsey* had been elected by the heirs of *Aylwin*, and duly appointed curator to his estate.

The defendant's counsel took several exceptions to the record.

Exemplifications of the record of judicial proceedings in a foreign country, must be considered as *prima facie* correct; if incorrect, the *onus probandi* lies on the opposite party.

Sed per Curiam. Exemplifications of the record of judicial proceedings in a foreign country, must be considered *prima facie* as correct; if incorrect, the *onus probandi* lies on the opposite party. Let the copy be read.

The defendant's counsel now insisted, that it was incumbent on the plaintiff to show the law of the Province of *Lower Canada*, upon which the certified proceedings were founded.

The plaintiff replied, that the proceedings were bottomed on the common law or ancient usage of the country, and being the *lex non scripta* could not be produced.

Sed per Curiam. When the question arises, what is a foreign law? if a written law it must be produced; if an unwritten law, it must be proved, like any other fact, by the testimony of disinterested and intelligent witnesses. Of this opinion was Lord *Mansfield*, as delivered in the case of *Mostyn* v. *Fabrigas*, *Cowper's Reports*, p. 174. "The way of knowing foreign laws is, by admitting them to be proved as facts, and the Court must assist the Jury in ascertaining what the law is."

When a question arises, what is a foreign law? if a written law it must be produced; if an unwritten law, it must be proved by the testimony of disinterested and intelligent witnesses.

The defendant now went to prove his declaration in set-off.

The plaintiff conceded the making of the note by the intestate *Aylwin* to *Frazer & Young*, and also their endorsement to the defendant,

But showed by certified copies, That *Thomas Aylwin* died in the year 1791. That *J. W. Woolsey* was the same year appointed curator on his estate, and immediately represented the estate insolvent. That the estate paid eleven shillings and nine-pence on the pound. That *Frazer & Young* exhibited their claim, *the nature of which the records do not show*, to the amount of 460*l.* 19*s.* 3*d.* *Halifax* currency, and on the 22d of *January*, 1793, received a dividend of three shillings and nine-pence on the pound; and on the 12th of *April*, 1799, a further dividend of eight shillings on the pound; when the estate was settled, and the note declared upon by the plaintiff; with another note made to the intestate for 40*l.* *Halifax* currency, were vended at public auction, and purchased by the endorsor, *J. W. Woolsey*, in his individual capacity.

The plaintiff now insisted that the defendant's demand on the note, declared upon the set-off, was

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absolutely barred by the operation of the *ex loci;* that *Aylwin's* note to *Frazer & Young* was included in their claim against the estate of 460*l.* 19*s.* 3*d.* upon which they had received two several dividends. If it was not included, as the firm was subject to the laws of the Province of *Lower Canada*, and the co-partners therein resident during the whole period of the settlement of the intestate's estate, if they omitted to profert their claim, it is for ever barred, and cannot be revived by endorsing the promissory note, which is the mere evidence of such claim to an inhabitant of this State.

Per Curiam. The Court are clearly of opinion, that when a demand is barred by the existing laws of a foreign country, where the contract was made, it cannot be revived by transferring it to an inhabitant of this State. But there are several obvious difficulties which present against the several demands of either party, which can only be removed by a knowledge of the existing laws, and their practical operation in the Province of *Lower Canada.* Either party may have his election to continue the cause until the next term, that in the interim satisfactory evidence of the laws of that Province may be obtained. The jurisprudence of the Province of *Lower Canada* is highly respectable; and no doubt can be entertained, from the eminent and learned professional characters who have adorned its Supreme Bench since the *English* conquest, and more especially since the establishment of its government by the act of the *British* parliament in 1791, that the operation of the provincial laws is clearly ascertained in all important cases by judicial decision.

The plaintiff now moved to enter a nonsuit, which was not opposed by the adverse party.

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Plaintiff nonsuited.

Josias Smith, *Samuel Miller*, and *Amos Marsh*, for plaintiff.

Nathaniel Chipman, *Daniel Chipman*, and *W. C. Harrington*, for defendant.

DAVID BRYDIA *against* NATHANIEL PLATT.

IN ERROR. This writ was brought to reverse a judgment rendered by *Addison* County Court.

It appeared, that in the original action *David Brydia* declared in case, demanding 2,000 dollars in several money counts.

The defendant *Platt* pleaded in bar a submission of all matters in demand between them to certain arbitrators on the 9th of *February*, A. D. 1798, their award to be made and delivered to the parties by the first day of *June* following. That on the 27th of *April*, 1798, the arbitrators delivered their award to the parties, and awarded that *Platt* should pay to *Brydia* 27 dols. 51 cts. on the same day, and that the parties should execute and deliver to each other mutual releases of all matters in demand until the day of submission.

The plaintiff below replied, (confessing the submission,) that the award was not made and delivered

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, FEBRUARY TERM, A. D. 1803.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

SIMEON FRANCIS, Plaintiff and Appellant,
against
The Administrators of SAMUEL LATHROPE.

Upon an appeal from the report of commissioners on an insolvent estate, the Court will allow a declaration to be filed on payment of costs, provided the nature of the plaintiff's claim can be understood by the certified copies from the registry of probate.

THIS was an appeal from the report of commissioners upon an insolvent estate. The appellant entered the certified copies from the registry of probate, but had omitted to file a declaration, although the na-

ture of his claim might be understood from the certified record.

The statute provides, "That if any creditor shall exhibit his claim or demand against any such estate so represented *insolvent* as aforesaid, to the commissioners as before mentioned, and the said commissioners shall disallow it wholly or in part; such creditor, conceiving himself aggrieved by the judgment and determination of the commissioners, may, at the time such commissioners shall make report and return to the Judge as before mentioned, or within twenty days afterwards, if such demand, so disallowed, in whole amounted to twenty dollars, or if the sum allowed by the commissioners of any demand exhibited be twenty dollars less than the sum demanded, appeal from the judgment and determination of the commissioners to the Supreme Court, next to be holden in the same County, whether the same be an adjourned or stated session of the said Court, signifying to the Judge in writing such his desire, and *filing in the probate office a declaration of his demand* against such estate, drawn up with the same legal certainty as is required in prosecuting demands in the Courts of Law; and the Judge shall cause the executor or administrator to be served with a copy of such declaration, and of the appeal made by such creditor, at least twelve days before the sitting of such Court, if there shall be so many days between the time of filing such declaration and the time of the session of said Court; and if there shall not be so long a time, then the copy aforesaid shall be served as soon as may be, and the creditor may, at the Court to which the appeal is made, on the first day of the sitting of said Court, enter his action

Vermont Stat. vol. 1. p. 153, 154.

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as plaintiff against the executor or administrator, and shall produce an attested copy of such his declaration, and a certificate from the Judge of Probate that notice hath issued to the executor or administrator thereon, and upon such declaration such pleadings may be had, and the matter issued in the same way and manner as though such action had been commenced in the ordinary and usual way, and had been entered in said Supreme Court by way of appeal from the County Court; and the said Supreme Court shall certify to the Judge of Probate the judgment they shall give thereon, &c. &c. And if the creditor shall fail to enter his action in manner and season as before directed, his demands shall be for ever barred," &c.

And now on motion, the Court allowed the appellant a day to file his declaration with the Clerk of the Court, under a rule that he should pay the administrators their costs, and tax no costs at this term, in case he eventually prevailed in the suit, and that he should at a day prescribed, serve the administrators with a copy of his declaration.

Cause continued.

STATE *against* JACOB PHELPS.

Vermont Stat. vol. 1. p. 341.

A woman divorced *a vinculo matrimonii* is not a competent witness upon an indictment against her former baron, for a crime committed during coverture.

THE defendant was indicted upon the 24th section of the act for the punishment of certain capital and other high crimes and misdemeanors, for being a

married man, and as such being found in bed with a woman not his wife, under such circumstances as afforded presumption of an illicit intention.

State v. Phelps.

On trial to the Jury, Mr. Attorney offered to adduce as a witness on the part of the prosecution, *Lucy Phelps*, wife to the defendant at the time of the commission of the crime alleged, but afterwards divorced *à vinculo matrimonii*, and cited the case of *The State* v. *J. N. B.* decided in *Addison* County, *January* term, A. D. 1801.

Vide *ante*, vol. 1. p. 36.

Hall, for the respondent. We consider that there is a wide difference between the case cited, and that *sub lite*. In the case relied upon, the prisoner was indicted for *forgery*, a crime not any ways connected with married life. Here the indictment is for the very adulterous conversation which was the prevailing cause of the divorce.

It is true, that in our *professional books*, jealousy is not classed among those causes which disqualify a witness; but in the *book of nature* we read that there is no passion that assails the human mind which so completely disqualifies it from seeing, knowing, or even relating the truth. The greatest judge of human nature among men has declared, that "jealousy doth *make* the meat it feeds on." From their greater sensibility this passion operates more powerfully on the softer sex; and even when it ceases with their affection for the beloved object, it is too often succeeded by an animosity equally regardless of reason or of truth.

It will not certainly, then, be good policy to suffer a witness, thus violently prejudiced, to testify against

State v. Phelps.

a defendant whose conduct she has seen through so jaundiced a medium, and who she may esteem herself justified in ruining *per fas aut nefas*.

The case cited stands alone. In the books there can be found no instance of a wife divorced *à vinculo matrimonii*, being admitted to testify against her former husband, as to any act done by him during coverture.

A wife under a second marriage, a former wife being living, may be a witness upon an indictment for bigamy against the husband *de facto*.

So, if a woman be taken away by force and married, she may, under the act of *Henry* VII. be a witness. But these decisions go on the position that these marriages are void, and the women who testify consequently not wives.

Some few instances may be found where a wife divorced *à mensa et thoro*, or separated by contract, may be a witness against her husband. But these cases, it is obvious, cannot apply.

Mr. Attorney arose to reply.

But the Chief Judge observed, that he had always considered the decision in the case of *The State* v. *J. N. B.* as not well founded. He considered it as not supported by law or sound polity. He had investigated the subject, and was fully prepared to decide against the admissibility of the witness.

JACOB, Assistant Judge, coincided in opinion, and the witness was not permitted to testify.

TYLER, Assistant Judge, *dissente*.

Mr. Attorney, for the State.
Lott Hall, for the prisoner.

State
v
Jenkins.

STATE *against* CATO JENKINS.

The confession of a person on trial for a crime must be submitted to and weighed by the Jury: if extorted by personal suffering, it ought not to weigh in the least; if produced by fear or flattery, the Jury must determine whether it is true or not; but if unsupported by corroborating circumstances, it cannot operate to convict.

THE indictment charged the defendant, that at *Rutland*, &c. on the evening of the 1st day of *January*, 1803, with force and arms, he feloniously took, stole, and carried away one portmanteau, value 5 dollars, containing one 100 dollar bill of the *United States* Branch Bank in *Boston*, one bill of 50 dollars of the *Boston* Union Bank, one 20 dollar of the same bank, and three 10 dollar bills of banks unknown to the Jurors; of the proper goods and chattels of one *Oliver Whitney*, then and there being found, *contra formam statuti.*

The prisoner arraigned pleaded not guilty, and trial by the Jury.

The facts which appeared in evidence were, that *Whitney*, the owner of the goods, had fastened his horse with the portmanteau upon the saddle, which contained a small jug of *West-India* rum, and, as *Whitney* testified, the bills described in the indictment; went into a tavern; passed a convivial evening; at a late hour he found his horse had slipped his bridle, was wandering in the public highway, and the portmanteau with its contents were missing. The next morning the defendant treated one *Washburn* with rum from the jug, which he had concealed in a barn. This led to a suspicion that the defendant stole the property. On being charged, he readily acknowledged that he had the portmanteau in his possession, which he had concealed in a hay-mow. He said he found it early the same morning in the road, but denied all knowledge of the bank bills. Some ill-advised persons then seized the negro, and

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undertook to extort a confession as to the bank-bills by torture, which was effected by suspending him by a halter round his neck from the limb of a tree, until he was nearly suffocated, and by other base and inhuman practices, too indecent to be mentioned. The negro, however, persisted in his first confession, and denied all knowledge of the bills.

The defence made was, that the inducements and motives to a confession ought to be taken into consideration. A confession, to operate against a prisoner on trial, ought to be voluntary, that if the confession is allowed to weigh in the determination of the Jury, the whole of such confession ought to be taken together; and when thus taken, the defendant's confession amounted to a mere *treasure-trove*, accompanied with some improprieties, but with no act which can constitute larceny; and as the minds of the humane were much agitated by this novel and abhorred procedure of attempting to extort a confession of crime by torturing the accused, the defendant's counsel urged it pathetically in his defence, endeavouring to connect it with his confession.

But the Court, after reprehending, in strong and pointed terms, the practice of torture as a means of discovering the truth, charged the Jury to inquire simply, whether the defendant was guilty or not guilty of the charges presented in the indictment. They observed, that the confessions of a person on trial must be submitted to and weighed by the Jury. If extorted by personal suffering, applied to the accused with a direct design, they certainly ought not to weigh any thing. If produced by fear or flattery, the Jury would judge whether the confession exhi-

bited the truth or not; and would observe whether a confession thus made was or was not supported by corroborating facts or circumstances; for a confession induced by fear or flattery, when unsupported by any other testimony, could never operate to convict.

That when goods are stolen, and the whole or part of them are found concealed on a person, this is *prima facie* evidence that the person stole them; and unless he can show that he came by them honestly, must conclude him guilty of theft. That when goods are lost, it is no excuse in the casual possessor, who conceals or converts them, that he *found them*. It is incumbent on the finder of lost property to advertise them under the provisions of the several acts "relating to pounds, estrays, and lost goods." If he neglects, and conceals or privately converts the property, he is justly chargeable with larceny.

That the *prisoner's confession* of his taking the portmanteau is corroborated beyond doubt by his producing it from a place of concealment, and was not made when under the operation of torture.

That, however we might feel as men at the relation of the wanton, cruel, and outrageous abuse done to the prisoner, we must not suffer the impulse of the moment, however honourable to our sensibility, to divert us, as Judges or Jurors, from the obligation of our official oaths.

When goods are stolen, and the whole or part of them are found concealed on a person, it is *prima facie* evidence that he stole them; and unless he can show that he came by them honestly, must conclude him guilty.

When goods are lost, it is no excuse in the finder, who conceals or converts them, "*that he found them.*" It is his duty to advertise them. *Vermont* Stat. vol. 1. c. xlvii. No. 1. No. 3. p. 466. 478.

The Jury returned their verdict guilty.

The defendant filed a motion in arrest of judgment. Vide *post*, p. 384.

Mr. Attorney, for the State.

Cephas Smith, Junior, for defendant.

State v. Hobbs and Strong.

STATE *against* ABRAHAM HOBBS and RETURN STRONG.

Torture to extort a confession of the truth from persons accused of crimes, contrary to the common law and constitution of *Vermont*.

INDICTMENT for a misdemeanor in torturing a person suspected of theft.

The indictment charged the defendants, that at *Rutland*, in the County of *Rutland*, on the first day of *January*, A. D. 1803, they being persons of cruel and inhuman dispositions, and moved by the suggestions of their own corrupt minds, made a violent assault upon the body of *Cato Jenkins*, then and there being in the peace of the State, and him the said *Cato Jenkins* with force and arms did then and there beat, bruise, torment, torture, and burn with fire, and him the said *Cato Jenkins* with like force did suspend and hang by the neck, &c. *et alia enormia*, &c. all which is against law, the constitution, and the peace and dignity of the State of *Vermont*.

The Jury acquitted *Return Strong*, and found *Abraham Hobbs* guilty.

The Court, in delivering sentence, observed, That there was no statute against the crime, as the Legislature never could have contemplated its commission in an enlightened age, and amongst a free people. That if such statute had existed, it would probably have been in the power of the Court to award a punishment more adequate to the enormity of the offence.

That the indictment is founded on the common law, and must be followed by a common law punishment.

However the practice of torture to extort confession had prevailed in various governments, it certainly never was sanctioned by the common or statute law of our *English* ancestors; for although the rack was occasionally resorted to in the reign of *Henry* VI. and even in the reign of Queen *Elizabeth*, yet Judge *Blackstone* observes, *it was used as an engine of state, not of law;* and upon the assassination of the Duke of *Buckingham* by *Felton* in the reign of *Charles* I. it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; but the Judges being consulted declared unanimously, to their own honour and the honour of the *English* law, that no such proceeding was allowable by the laws of *England.* But in all ages and countries where this inhuman and unreasonable process has been in use, men of enlightened minds, so far as they have had occasion to mention it, have borne testimony against it; principally, however, on account of its uncertainty as a criterion of truth. Among the ancients it will be sufficient to name *Cicero* and *Quintilian*, and among the moderns the Marquis *Beccaria.** But in discountenancing

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* *Tamen, illa tormenta gubernat, dolor moderatur natura, cujusque tum animi tum corporis, regit quæsitor, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur.* M. T. C.

Omnium quidem incertorum suspiciones pessime semper à corporibus; nec bene de cujusquam moribus illam partem corporis interroges, quæ non animo sed dolore respondet. Quintilian.

In a note under the preface to the second edition of the State Trials, there are several quotations from the fragments of *Julius Paulus, lib. 5. sentent. recept. tit. 14. de quæstionibus ha-*

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this ordeal by this Court, its inhumanity has, if possible, a greater weight than its absurdity.

But it is unnecessary to enlarge. The 10th article of the Declaration of the Rights of the inhabitants of the State of *Vermont*, declares, " That in all prosecutions for criminal offences, a person hath a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with witnesses; to call for evidence in his favour, and a speedy public trial by an impartial Jury of the country; *nor can he be compelled to give evidence against himself*, nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers."*

Vermont Stat. vol. 1. p. 33.

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bendis. Si suspicione aliqua reus urgeatur, adhibitis tormentis de sociis et sceleribus suis confiteri compellitur.—Reus evidentioribus argumentis oppressus repeti in quæstionem potest, maxime, si in tormenta animum corpusque duravit. And lib. 1. section 23. *Res est fragilis, et periculosa, et quæ veritatem fallit; nam plerique patientia, sive duritia tormentorum, ita tormentum contemnunt, ut ex primi veritas nullo modo possit; alii tantâ sunt impatientia ut in quovis mentiri, quam pati tormenta, velint; ita fit; ut etiam vario modo fateantur, ut non tantum se verum etiam alios comminenter.*

See also *Beccaria* on Crimes and Punishments. Judge *Blackstone*, in his Commentaries, quotes from this author what he styles an *exquisite piece of raillery*. He says the Marquis has proposed this problem with a gravity and precision that are truly mathematical. " The force of the muscles and sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."

* This article in the Declaration of Rights may be traced as *ab ovo* from the *English Magna Charta*, although the rights of

In this concise and luminous display of the rights of the citizens of this State, especially in the penultimate clause, all compulsory process to enforce an acknowledgment of guilt is for ever excluded, not only from our judicial proceedings, but all attempts of individuals to extort confession by bodily suffering is reprobated. For it may be observed, that if the trial by torture might be essayed for the discovery of truth, it certainly would be more safe and proper, that it should be regulated by law and administered by the officers of government, than to be indiscriminately applied, and restrained only by the moderation or caprice of individuals.

Vide *ante*, vol. 1. p. 36.

The Court sentenced the culprit to pay a fine to the State treasury.

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the subject are better understood and more clearly defined than at the date of this celebrated instrument. The 29th chapter of *Magna Charta*, 9th of *Henry* III. declares, that "*Nullus liber homo capiatur, vel imprisonetur, aut dissesietur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur*, aut aliquo modo destruatur, *nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ.*" Which words, "*aliquo modo destruatur*," according to Sir *Edward Coke*, (2 *Inst.* 48.) include a prohibition not only of killing and maiming, but *also of torturing*, and of every oppression by colour of an illegal authority.

For the more *especial* clause we are indebted to the common law maxim, *Nemo teneatur seipsam accusare.....Reporter.*

State
v.
Jenkins.

The STATE *against* CATO JENKINS.

One Judge of the Supreme Court, in the absence of the others, may legally impanel and charge the Grand Jury.

MOTION in arrest.

The defendant had been indicted for larceny, and found guilty by verdict of the Jury.

The motion was grounded on an exception to the array of the panel of Grand Jurors who presented the indictment, for that they were not legally impanelled, in this, that the foreman had been appointed, and the Jurors charged by one Judge in the absence of the others, not constituting a quorum of the Court for these purposes, the other Judges not having been interested, or of counsel.

Vermont Stat. vol. 1. p. *55.*

In support of the motion it was urged, that the 6th section of the act constituting the Supreme Court of Judicature and County Courts, defining their powers and regulating judicial proceedings, enacts, "That there shall be, and hereby is constituted a Supreme Court of Judicature within and for this State, to be holden at the respective times and places by law appointed for that purpose; which shall consist of one Chief Judge and two Assistant Judges, any two of whom shall be a quorum. And any one of said Justices, in the absence of the others, shall have power to open and adjourn said Court from day to day, until a quorum shall be convened, or to the next stated session at his discretion. That whenever the statutes speak of the impanelling a Grand Jury, they always contemplate a quorum of the Court, and never a single Judge, who has only power to adjourn the Court, in case there is not a quorum. The 59th section of the same act provides,

Ib. p. 78.

That it shall be the duty of the Clerk of the Supreme Court of Judicature in each County, some time previous to every stated session of said Court, to issue a *venire* directed to the sheriff of the County, or his deputy, and seasonably deliver or cause to be delivered to such sheriff or deputy, commanding him to summon eighteen judicious men, being freeholders within said county, from the towns therein mentioned, to appear before said Court at ten o'clock on the first day of the session of said Court, to serve as Grand Jurors *in said Court.*

The 63d section provides, " That when it shall happen that a sufficient number of Jurors summoned as aforesaid do not appear, or if by reason of challenges or other causes, there shall not be a sufficient number of Jurors to make up the panel or panels, *the Court* shall order the sheriff or other officer to fill up such Jury or Juries by summoning either with or without a precept, a sufficient number of judicious men, being freeholders of the vicinity.

The 65th section makes it the duty of *the Court* to appoint a foreman. And that " no person shall be held to trial or put to plead to any indictment or information for a capital offence, unless a bill of indictment be found against such person for such crime by a Grand Jury legally impanelled and sworn."

On the other hand it was said, That although, generally speaking, a quorum of the Court must consist of two members, yet for certain purposes it might consist only of one; as in the 7th section of the judiciary act, one Judge might hold a Court for

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the trial of a cause where the others were interested, or had been of counsel for either party.

That the charge to the Grand Jury rests entirely on the common law, no provision being made for it in the statutes, it being only incidentally included in the oath administered to the Grand Jury. That by our practice the charge is delivered by one Judge without the interference of the others.

That no possible injury can be pointed out as accruing to the prisoner from the Grand Jury having been impanelled, and the charge delivered by one Judge in the absence of the others. That great convenience had arisen from this mode. That the Grand Jurors and witnesses being obliged to attend the first day of the term, it would sometimes happen, that through the indisposition of the Judges, or the rigour of the season, but one of the Judges could attend until the second or third day, until when the Grand Jurors and witnesses remain idle at the public expense, when no sufficient reason can be offered why they should not be impanelled and proceed to business on the charge of the Judge present.

That the impanelling the Grand Jury, the appointment of the foreman, with the charge of the Judge, and even the directing the panel to be completed *tales de circumstantibus*, are but ministerial acts in the Judge.

And finally, That it had been heretofore the practice for one Judge, in the absence of the others, to impanel and charge the Grand Juries.

The Court ruled, that one Judge, in the absence of the others, might legally impanel and charge the

Grand Jury; and that on motion in arrest of judgment, this is no sufficient exception to the array.

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Rule discharged.

TYLER, Assistant Judge, having delivered the charge to the Grand Jury, gave no opinion.

STATE *against* JOSEPH DAMON.

PLEA of *auterfoits convict*, in bar.

When an assault and battery has been made upon two, and both were wounded by the same stroke, and the offender has been legally convicted before a court of competent jurisdiction for the breach of the peace in the assault and battery upon the one, an indictment cannot afterwards be maintained against him for an assault and battery upon the other.

The indictment charged the defendant with an assault and battery on one *Elias Doty*, at *Wallingford*, on the 24th of *March*, A. D. 1802.

And now the said *Joseph Damon*, in his own proper person here in Court, in the custody of the sheriff, comes, &c. and to the said indictment here in Court found against him for an assault, battery, wounding, &c. made on the 24th day of *March*, 1802, on the body of *Elias Doty*, at *Wallingford*, in said County, he the said respondent says, that he has been once before convicted for the same breach of law, whereof he is now here indicted before *Joseph Randall*, Esquire, one of the Justices of the Peace within and for the County of *Rutland*, on the 26th day of *March*, 1802, at *Wallingford* aforesaid, and by said Justice adjudged to pay a fine of six dollars to the treasury of the town of *Wallingford* aforesaid, and costs of prosecution taxed at five dollars and sixty-three cents, as by the files and records of said Justice's Court, here ready in Court to be

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shown, will fully appear; and for that said Justice of the Peace had and still has a concurrent jurisdiction with this Honourable Court in such inferior crimes and misdemeanors; and for that the said *Joseph Damon* did, at *Wallingford* aforesaid, on the day and year first aforesaid, without leave and against the regulations of a certain infirmary vulgarly called a pock-house, at said *Wallingford*, where there were divers persons inoculated and infected with the small-pox, enter said pock-house, he the said *Joseph Damon* having been, on the said twenty-fourth day of *March*, 1802, by the presiding physician of said infirmary, inoculated with the small-pox, and afterwards, on the day and year last aforesaid, the said *Joseph Damon* declared that he would depart from the limits of said pock-house, and attempted so to do; which to prevent, the said *Elias Doty* and one *Frederick Miller*, by order of the said presiding physician, assaulted him the said *Joseph Damon*, and the said *Joseph Damon*, in his own defence, in his hand held an open penknife, and did then and there move his hand on all sides to prevent them the said *Elias* and *Frederick* from laying hands on him the said *Joseph Damon*, notwithstanding which, they the said *Elias* and *Frederick* did with great violence rush upon the said *Joseph*, and him cast and throw on the ground, and did then and there beat, bruise and batter the body of him the said *Joseph*, and for that the said *Joseph Damon*, in and during said affray, did unfortunately wound the said *Elias Doty* in the thigh, and the said *Frederick Miller* in his arm, at one and the same instant, and at one and the same stroke, which is the same assault, battery, wounding, &c. whereof the said *Joseph Damon* stands

here indicted, and no other; for that the said conviction and judgment before the said *Joseph Randall*, Esquire, Justice as aforesaid, was for the offence of assaulting, beating, and wounding the said *Frederick Miller*, all which the said *Joseph Damon* is here ready to verify and prove, in manner and form and when and where the Court shall direct. Wherefore he prays judgment whether he ought further to be holden to answer to said indictment, and that the same may be barred, and he the said *Joseph* go without day.

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To this plea the Attorney for the State demurred.

In support of the plea,

Chipman, for the defendant, observed, That when an assault and battery was made, and several were injured, the law gave to each a separate civil action for damages, and the government would by due process convict and punish the offender for the breach of the public peace; but if ever so many were injured, *one* prosecution and conviction was all the government could sustain against the offender. The charge on the part of the State against the prisoner is for disturbing and breaking the public peace; and he is equally guilty of it who assaults and beats *one*, with him who assaults and wounds two or more; both have broken the public peace; and although the latter would perhaps merit a severer punishment, yet the crime is the same.

The only inquiry which can possibly be made is, whether the offender has been legally convicted of the same offence before a Court of competent jurisdiction? The defendant had unfortunately wounded

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two persons in the same affray and with the same stroke; a regular complaint has been entered for assaulting and wounding one of them; the defendant has been tried and convicted before a Court of competent jurisdiction, and the record of his conviction is here in Court, and proferted in his plea. Can an indictment be sustained against him for assaulting and wounding the other?

Curia. It appears that the defendant wounded two persons in the same affray, at the same instant of time, and with the same stroke. On a regular complaint made, he has been convicted before a Court of competent jurisdiction, for assaulting, beating and wounding *Frederick Miller*, one of those persons. He stands here indicted for assaulting, beating and wounding *Elias Doty*, the other of those persons; and the defendant pleads in bar the former conviction, which he alleges to have been for the same offence. The only question is, whether the defendant has been already legally convicted of the offence charged in the indictment? Of this there can be no doubt; for it is apparent on the record, that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice *Randall*, were at the same place and in the same affray, and the wounds made by the same instrument and by the same stroke.

This is not a question between either of the persons injured by the assault and battery, and their assailant, redress has been or may be obtained by them by private actions; but it is a question between the government and its subject, and the Court are clearly of opinion, that the indictment cannot be sustained. The indictment charges the defendant with having

disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a Court of competent jurisdiction. He cannot therefore be again held to answer in this Court for the same offence.

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Prisoner discharged.

—— ——, for the State.
Daniel Chipman, for defendant.

NOAH ASHLEY, Appellant,
against
SAMUEL WILLARD and JAMES HALL, Appellees.

When an action is brought against two upon their joint note, the individual demands of either may be pleaded in set-off to the note.

THE plaintiff declared upon a promissory note made by the defendants *jointly* to one *Ebenezer Kingsley* or order, and by him endorsed, and notice of the endorsement given.

The defendants filed a declaration in set-off, with several counts, as against the endorsor before notice received; one of which counts was upon a receipt given to the defendant *Willard* upon settlement of book accounts, in which *Kingsley* acknowledged there was due to him a balance of 44 dols. 68 cts.

The question now made was, whether, as the note was made *jointly* and not *severally* by the defendants, they could, in their declaration in set-off, count upon any sum due to either individually.

Sed per Curiam. The joint promisors to a note are copartners in the contract, and the payment of

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one is the payment of both. If the promisee is indebted to both or either, they may join in a declaration in set-off, and have several counts; some applicable to the demands of one, and some to the demands of the other; or entirely to the demands of one, or the joint demands of both.

Plaintiff nonsuited.

Cephas Smith, Junior, for the plaintiff.
Chauncey Langdon, for defendant.

BOWNE, Appellant,
against
RALPH PAGE, ABEL LARKIN, and NATHAN OSGOOD.

A. mortgages land to *B.* who brings a bill in chancery to foreclose the equity of redemption against him, and by an interlocutory decree *E.* and *F.*, who are not privies to the mortgage, (butclaim title to several parts of the lands by deed or ancient adverse possession,) are made parties to the bill, and *B.* obtains a decree foreclosing the equity of redemption by a day certain *nisi*. If *B.* after the expiration of the term allowed for redemption, brings ejectment against the *three*, and *A.* is defaulted, he cannot show the decree in chancery in evidence to estop the other two defendants from impeaching *his* title to the lands, or showing a better title to the whole or any part of them in themselves.

EJECTMENT. The plaintiff demanded seisin and possession of lands in *Rutland*.

Nathan Osgood suffered a default.

Ralph Page pleaded *severally* the general issue as to one acre of the land, and certain mill privileges, and disclaimed as to residue.

Abel Larkin pleaded severally the general issue as to one moiety of the land demanded, and disclaimed the other moiety.

The plaintiff offered in evidence to the Jury a decree of the Court of Chancery, promulgated *May*

adjourned term, A. D. 1800, by which the present plaintiff, as orator, foreclosed the equity of redemption of the land against the two defendants and *Nathan Osgood*, then respondents.

The facts are, that *Nathan Osgood*, Esquire, mortgaged the land to the plaintiff by deed dated *September*, 1792. Before the equity of redemption was foreclosed, *Osgood* executed a deed of one acre of the land, and certain mill privileges, to *Ralph Page*, and *Abel Larkin* held one moiety of the land by an ancient adverse possession. The plaintiff brought his bill in chancery against *Osgood* to foreclose the equity of redemption, and upon suggestion to the Court, that *Page* and *Larkin* were interested in the premises mortgaged, he obtained an interlocutory decree that they should be made parties to the bill. Subpœnas issued citing them to appear, of which they took no notice, and the bill was taken *pro confesso* against all, and a decree was made that the equity of redemption should be foreclosed against the three by a day certain *nisi*.

Chipman, counsel for the two defendants, now objected to the decree's being read in evidence to the Jury. The question now in issue to the Jury is, whether the plaintiff has a good title in fee to the land demanded in the declaration, and not, as between the mortgagor and mortgagee, whether the conditional deed has become absolute or not. A decree in chancery does not bind the legal interest in the estate, but the person only. *Harrison's Chancery*, p. 324.

Osgood claimed title to the land, and mortgaged all his right and title to the plaintiff, who has fore-

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closed the equity of redemption as relative to him, and now has brought his action of ejectment to obtain possession; *Osgood* has been defaulted, and the plaintiff may have possession of all his right in the land, but the mortgage contract between the plaintiff cannot affect the right of others not privy to it. It is true the now defendants were cited in and made parties to the chancery suit; but this was not for the benefit of the orator, but for their benefit, that they might have a right to redeem by paying the mortgage money; but they considered themselves in no way interested, and did not appear. *Page*, it is true, purchased under the mortgagor, and subsequent to the mortgage; but *Larkin* holds an ancient adverse possession of a moiety of the mortgaged premises, and has disclaimed all right and title to the other moiety. The question is, can the decree in Chancery estop the defendants from impeaching the plaintiff's title, or showing a title in themselves to such sections of the land as they respectively claim. Does the decree in chancery create a fee in the orator, now plaintiff. This would be augmenting the chancery powers to an extent never before contemplated. The objects of Chancery with us are frauds and trusts; but when even a specific performance of a contract to convey land is enforced by a decree, it is under a penalty, and the party has his election to pay the penalty or execute the deed; for a decree in Chancery can only bind the person, and not the estate. If *Larkin* had appeared when made a party to the bill in Chancery, he never could have shown his adverse possession or title, for the fee of the land was not in issue. It was a mere question between the mortgagor and mortgagee. The bill stated, that the

respondent *Osgood* had mortgaged certain lands to the orator, and that the condition of the mortgage had been broken, and therefore prayed in the usual form, that the Court of Chancery would decree that *Osgood* the mortgagor should pay the sum for which the land was pledged, by a day to be assigned by the Court, or be for ever foreclosed from redeeming the mortgaged premises. By the practice in Chancery, if the mortgagee does not include in his bill all who are interested in the land mortgaged, they may afterwards, by bill of revivor, open the mortgage, and have a day to redeem. To avoid this, the orator procured the present defendants, by an interlocutory decree, to be made parties to the bill; subpœnas issued, and they did not appear; and the decree, as relative to them, merely saves a right to redeem, but by no means touches their right or title to the land. *Osgood* executed *a deed* to the plaintiff with a condition of defeasance, which, if not complied with on his part, was to become absolute as against him. By the decree in Chancery the deed has become absolute as against him; his right and title to the land has passed to the plaintiff; he acknowledges this by his default in the present action; but if he had defended the present suit, he would have been estopped from impeaching the plaintiff's title derived from himself, and the decree might have been read in evidence against him, to show that the deed, which was conditional, had become absolute; but this decree cannot thus be shown in evidence against the present defendants, who have no privity in the mortgage deed.

The point in issue to the Jury is, whether the plaintiff has a title in fee to the land demanded in his

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declaration; and this is an issue which can only legally be tried in the common law courts. Here the defendant *Page* may show that the fee of the acre of land which he claims is in himself, and the defendant *Larkin* may establish a title limited in him by ancient adverse possession, and both may show that the fee of such sections of the land as they respectively claim was not in *Osgood*, the plaintiff's grantor.

Cook, in reply, insisted, That the decree in Chancery estopped all who were made parties to it from contesting the orator's, now plaintiff's, title to it, derived from the mortgagor, and of showing a title by purchase or possession in themselves. He cited *Harrison's Chancery*, p. 583, 584. and 636. "All parties to the suit or decree shall be bound by the decree if they are of full age, *compos mentis*, &c. and where any come in *pendente lite*, and while the suit is in prosecution regularly, the decree bindeth them." "Decrees of this Court are equal to judgments at law, and their execution as effectual or more so."

Vide *Newland's* edit. p. 324.

Sed per Curiam. The decree in Chancery cannot be read in evidence.

John Cook and *Darius Chipman*, for the plaintiff.

Daniel Chipman, *Chauncey Langdon*, and *Cephas Smith*, junior, for defendants.

ABIJAH HURLBUTT *against* JONATHAN and ISAAC MEACHUM and PETER CRAMMER.

APPEAL from a Freehold Court.

When two or more are made defendants under the processesprovided in the act against forcible entry and detainer, and all are found guilty and one appeals, it will be considered by the Court that he appeals for the other or others.

In this cause, at the Court below, the Jury found all the defendants *guilty*. *Isaac Meachum* alone appealed; and when the cause was called in order, the other two defendants proceeded to plead by their attorneys.

Langdon, for the complainant, objected, and insisted, that *Jonathan Meachum* and *Crammer* were not in Court; that by neglecting to appeal they had submitted to the verdict in the Freehold Court, with which they must rest satisfied.

That whenever a party appeals from any Court, he must enter a recognisance to prosecute to effect, and to respond costs and intervening damages. These persons had entered no such recognisance as is provided generally by the 3d section of the judiciary act, and more especially by the 9th section of the act against forcible entry and detainer, upon which this process is founded.

Vermont Stat. vol. 1. p. 53. and 218.

Chipman, *e contra*. The act against forcible entry and detainer seems to contemplate only one defendant; as in the latter clause of the first, and in the 2d, 5th, 6th, 7th, and 8th sections, and in the 9th section, which gives the right of appeal, one defendant alone is contemplated. The words are, "That if either party in a prosecution on this act shall think *him or herself* aggrieved with the determination of the Justices aforesaid, *he or she* (*not they*) shall have

Ib. p. 215. *et seq.*

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liberty to appeal." The case of a plurality of defendants is therefore a *casus omissus* in the statute, and the practice in such case must be governed by the sound discretion of the Court.

It certainly appears necessary, in the practice under the act, that the defendants found guilty in the Freehold Court, should, on appeal, be brought *conjointly* into this Court, that the writ of restitution may go to remove all from the premises.

Further. If two of the defendants are found guilty in the Freehold Court, and one appeals, the Justices cannot award a writ of restitution as against the two, or tax costs and issue an execution against them separately from the one who has appealed. The form of the writ of execution, as prescribed by the statute, combines the execution for costs with the writ of restitution, and it cannot issue until subsequent to the final judgment.

Vermont Stat. vol. 2. 363.

Opinion of the Court.

Curia. When two or more are made defendants under the processes provided in the act against forcible entry and detainer, and all are found guilty, and one appeals, it will be considered by the Court that he appeals for the others.

The defendants have leave to file their pleas.*

Langdon, for complainant.
Chipman, for defendants.

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* Might not the Court have ruled, that the defendants, *non appellantibus*, should have entered bail for costs, &c. before they were admitted to plead?

ABEL PHELPS, Reviewer,
against
ABNER HALL, Reviewee.

SCIRE FACIAS. The plaintiff declared, That on the 21st of *March*, A. D. 1799, he prayed out a writ of attachment against *Jonathan Henry*, returnable to *Rutland* County Court, *November* term, A. D. 1799. That he delivered the writ to *Gardner Clark*, constable of *Wallingford*, to serve and return, who returned that he had arrested *Henry*, and took the defendant as bail for his personal appearance, &c. that by the consideration of the same County Court he recovered judgment against *Henry* for 56 dols. 8 cts. damages, and 11 dols. 37 cts. costs of suit, and in due time took out his writ of execution, and delivered the same to the high bailiff to serve and return; who returned a *non est inventus*, and the plaintiff therefore cites the defendant to show cause, if any he have, wherefore the said *Abel Phelps* ought not to have his execution for the damages and costs aforesaid against him with additional damages and costs, &c.

The interest which will exclude a person from testifying, must be a *direct interest* in the event of the suit; not a contingent, remote or possible interest; and in all cases of doubt the Court will admit the witness to testify, and submit his credibility to the Jury.

The defendant pleaded in bar an accord and satisfaction. That before the return of the original writ, to wit, on the 5th day of *November*, 1799, at *Wallingford*, the plaintiff, in consideration of three dollars to him in hand paid by the said *Jonathan Henry*, agreed to discontinue the suit, and thereby to release and discharge the said *Henry* from the arrest made by virtue of said writ of attachment, *et hoc paratus est verificare.* Wherefore he prays judgment, &c.

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The plaintiff replied by traversing the facts in the plea in bar, and says, that he did not, in consideration of three dollars in hand paid to him by the said *Jonathan Henry*, agree to discontinue the said suit, and thereby to release and discharge the said *Henry* from the arrest made by virtue of said attachment; *absque hoc.*

Upon this traverse issue was taken, and put to the Jury.

It appeared by the defendant's witnesses, that the sum of three dollars was paid by *Henry* at the time and place alleged in the plea in bar to *Samuel Prentice*, Esquire, the plaintiff's attorney in the original suit. But the question arose, for what it was paid; whether as a consideration for the accommodation of the original suit, or certain other actions, which Mr. *Prentice* had instituted against *Henry*, at the suit of others.

The plaintiff offered to show by Mr. *Prentice*, that the money was received and applied as intended by *Henry* in part discharge of costs accruing in other suits, of which he had the management as attorney.

Chipman, counsel for the plaintiff, objected to the *competency* of the witness, as *interested;* and insisted, that if the plaintiff did not recover in the present action through the prevalence of the bar, he could well maintain an action against the witness his attorney; for it was impossible to sustain the bar without showing improper conduct in the attorney who received the money.

Sed per Curiam. Objections to the *competency* of witnesses have of late failed to have that weight in

Courts of Justice which they anciently had. Indeed some distinctions, which exclude some and admit others to testify, seem very nice. The remainder-man cannot, say the books, be a witness, but the heir at law may; although his ancestor may be on his death-bed, expiring with old age. The rule which has governed this Court is, that the interest which shall exclude a person from testifying must be *a direct interest* in the event of the suit; not a contingent, remote, or possible interest; and in all cases of doubt whether the interest is direct or not, the Court will admit the witness to testify, and submit the credibility of his testimony to the Jury.

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In the present case, the Court see no direct interest in the witness. Let him be sworn; and the Jury, under the charge of the bench, will weigh his credibility.

Witness admitted.

Daniel Chipman, for plaintiff.

Cephas Smith, junior, and *Darius Chipman*, for defendant.

The Same *against* The Same.

IN this cause, after the Petit Jurors were impanelled for the trial of the issue in bar, it was discovered that *Elias Post*, the foreman, had recognised as surety for the plaintiff for costs of prosecution.

It is good cause of challenge to a Petit Juror, that he has been recognised for costs of prosecution in the suit, though he has been discharged from his recognisance. And although such Juror may have remained on the panel by consent of parties, yet this shall not conclude the party from challenging him for this cause, upon the impanelling another Jury to try the same issue.

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By consent of the parties he was discharged from the recognisance, and fresh bail entered, and he was suffered to remain on the Jury; but it happened that the Jury were discharged without returning a verdict, a delay being granted. Upon the impanelling the Jury a second time at the same term, for the trial of the same issue, the defendant challenged the foreman for favour.

Two questions were now submitted:

First. Whether it is good cause for challenge to a Petit Juror in a civil action, that he has been recognised as surety for costs of prosecution, though discharged from his bond.

Secondly. Whether, when such Juror has been impanelled by *consent* of parties, and the Jury are discharged of the cause, such consent takes away the right of challenge to the Juror when called to be impanelled on another trial of the same issue, at the same term?

Opinion of the Court.

Curia. The Court consider that there is a wide distinction between the interest which will disqualify a Juror and a witness. It is no disqualification in a witness, that he has a partiality for a party. Witnesses are often admitted to testify *ex necessitate rei*, and are often discharged of a direct interest by act of the party in open Court; and when admitted, the credit which shall be given to their testimony is weighed by the Jury, who make due allowance for all such partialities as are not sufficient to render them incompetent to testify. But no occasion can occur to render it necessary for one Juror to set on the panel in preference to another, and a Juror hav-

ing once had a direct interest in the event of a suit, cannot be so far purged of the bias in his mind resulting from it by a discharge of his interest as to be qualified to set on the Jury. Such pre-existing interest is a good cause of challenge; for the triers should be purged from all possible interest and partiality. But a question might arise, whether, if no challenge was made, this exception could prevail on motion in arrest of judgment.

As to the second point, the Court are clear, under the decision of *Pearl* v. *Allen*, that concessions made by parties during trial, and not attached to the record, cannot bind at any future trial. Vide vol. 1. p. 4.

The challenge prevailed.

Daniel Chipman and *Samuel Prentice*, for the plaintiff.

Cephas Smith, junior, and *Darius Chipman*, for defendant.

ARTHUR HAMILTON, Appellant,
against
WILLIAM MARSH, Appellee.

When an officer neglects to return a writ through mere casualty, the actual injury the plaintiff has sustained, by the non-return of the precept, must be the measure of damages.

ACTION against an officer for neglecting to return a writ of attachment.

The plaintiff declared on the case, for that he purchased out a writ of attachment against one *Charles Forbes*, upon a promissory note for 111 dols. 25 cts. returnable to *Rutland* County Court, *November*, A. D. 1800; that he delivered the same to the de-

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fendant in his capacity of constable of *Shrewsbury*, to serve and return according to law, as therein commanded; but the defendant, &c. neglected to return said writ, &c. whereby he hath totally lost his debt, and suffered other damage.

The general issue pleaded and put to the Jury.

It appeared in evidence, that at the service of the writ, *Forbes* was an inhabitant of the State, and held in fee a farm in *Shrewsbury*, and possessed a valuable personal property; that the defendant arrested *Forbes*, and took responsible bail for his appearance; that before the return day he conveyed his real estate, and removed with his personal property into the State of *Massachusetts*, where he purchased a farm, and has resided ever since in the vicinity of the plaintiff, who is his brother-in-law; that the officer lost the writ on his way to the County Clerk's office.

The question now made to the Jury is, what shall be the measure of damages?

The plaintiff contended for his whole demand upon the promissory note, with the costs of the writ, and for his travel and attendance at Court.

The defendant's counsel urged, that his failing to return the writ was not a *wilful neglect*, and that it was in evidence that the plaintiff's debt was not lost, but might be readily recovered by the plaintiff, who was in affinity with him, and commorant in his neighbourhood, where *Forbes* possessed property amply sufficient to discharge the demand.

Curia. The Court, in their charge to the Jury, directed them to distinguish between a wilful ne-

glect in an officer to return a precept in a civil action, and a neglect occasioned by mere casualty. In the former case, the officer may be even punished criminally, and the party injured ought to recover the whole debt, if it be lost by the neglect; and if the original defendant be in good circumstances, so that the debt is not lost, the plaintiff ought to be recompensed for the injury he may have sustained with exemplary damages, according to the aggravation of the wilful neglect; but where an officer neglects to return a precept through mere casualty, as in the present case, the *actual injury* the plaintiff has sustained by the non-return of the writ must be the measure of damages.

The Jury returned a verdict for the plaintiff, 20 dollars, and costs.

Darius Chipman, for the plaintiff.
—— ——, for defendant.

THOMAS MILLER *against* HENRY GOULD.

RULE to show cause.

After complaint made for the non-entry of an appeal, and prayer for affirmation of the judgment in the Court below, with additional damages and costs, the Court will, on motion, allow the appeal to be entered under a rule.

On the *third day* of the term, *Miller* filed his complaint for the non-entry of an appeal taken by *Gould* from the judgment of the County Court, and prayed for the affirmation of the judgment in the Court below, with increase of damages and additional costs, under the 4th section of the judiciary act, which enacts, "That when any person shall appeal from

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the judgment of any County Court as before-mentioned, and shall neglect to enter and prosecute his appeal to effect in manner as is before provided, the appellee in such case may enter his complaint in the Court to which such appeal was taken, and producing attested copies of the judgment and evidence necessary for that purpose, the said Court shall affirm the original judgment with additional costs, and allow to the appellee interest on the debt or damages so by him recovered as increase of damages, occasioned by the appellant's delay, at the rate of twelve per centum per annum."

And now, before the affirmation of judgment,

Walker, counsel for *Goold*, moved a rule upon *Miller* to show cause why he should not have leave to enter his appeal.

Rule granted.

—— —— showed cause, and insisted, that by the rules of the Court no appeal could be entered after the first day of the term, which, by the indulgence of the Court, had been construed to extend to the opening of the Court on the second day; that if the appellant neglects to enter by the time prescribed, it is conclusive that he does not intend to further prosecute; that the adverse party, under the statute, may then enter his complaint, stating his opponent's neglect, and praying for affirmation of the judgment in the Court below, with increase of damages and additional costs. That this process by complaint does not contemplate the appellant's being in Court; it allows him no day in Court, and was provided expressly in case of his non-appearance and neglect, to

enter his appeal. That it would defeat the rule of the Court, as well as do away the intent of the statute, and certainly would subject the appellee to great costs and inconvenience, to be kept day after day with counsel and witnesses attending, in a state of perilous uncertainty, to know if the appellant intended to enter his appeal, and the cause was to be tried, or whether the appellant intended to abandon the prosecution of his appeal.

That this embarrassment in the appellee would be greatly increased, if, after having entered his complaint, a rule of this nature could be made absolute against him; for when the day of entry of the appeal had passed, and especially when he had entered his complaint, and filed copies of the case, he might surely, as in the present case, dismiss his witnesses, discharge his counsel, and rely upon the affirmation of his judgment, with increase of damages and additional costs, which under the statute is a mere matter of course.

Walker, e contra. We should not press the rule if the entry had been delayed through mere inattention; but we have affidavits to show that the parties had contemplated an accommodation of the suit; and that these adversaries, with a benign spirit which we trust will meet the approbation of the Court, were endeavouring to "*agree by the way*," until the day of entry of the appeal had elapsed.

Per Curiam. The statute does not designate any day of the term on which an appeal shall be entered. The entry must therefore be subjected to the general rules of the Court, and these rules must be so ap-

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plied as to correct, and not essentially to injure parties. The rule of *August* term, 1790, has been frequently departed from by the express decision of the Court, as in *Bennet* v. *Whitney*, *January* term, 1801. (Vide *ante*, vol. 1. p. 59.) In this case the entry was allowed on the third day of the term, as it appeared that the appellant had been delayed in his attendance at Court, through the inclemency of the season. Here it appears there has been some conversation respecting a settlement of the suit. If the appellant is desirous of having his cause adjudicated in this Court, he must not be deprived of this privilege, through a rigid adherence to our general rules. If the appellee has been put to costs, or suffered otherwise by the appellant's laches, the Court will consider it, and compensate him in their judgment upon the rule.

Vide vol. 1. p. 479.

Let the rule be made absolute, and the appellant have leave to enter his appeal under a rule that he tax no costs for this term.

Rule made absolute.

Samuel Walker, for the appellant.
——— ———, for the appellee.

Hobbs v. Whitney and Parker.

ISAAC HOBBS, Assignee of BELL, Sheriff,
against
SILAS WHITNEY and JONATHAN PARKER, Junior.

DEBT on gaol bond.

The plaintiff declared upon a bail-bond executed by the defendants to the sheriff of *Rutland* County, as keeper in chief of the County gaol, conditioned that *Silas Whitney*, a prisoner confined upon an execution which issued in favour of the plaintiff, upon a judgment rendered by the Supreme Court of Judicature, *July* adjourned term, 1798, for 174 dollars debt and costs; and then alleged an escape on the 18th of *April*, 1801, and an assignment of the bond *October* following, under the statute.

Whenever a prisoner for debt is admitted to the liberties of the prison, and a bond with surety taken to indemnify the sheriff, the *least inducement*, or even countenance given by the creditor to the departure of the prisoner from the liberties, is a good bar to an action on the bail-bond, when the escape is assigned in breach.

The defendants pleaded in bar, *in substance*, that before the escape and assignment of the bail-bond, to wit, on the 18th of *April*, 1801, the plaintiff, with a fraudulent design to charge the bail, enticed the prisoner to depart the liberties, and that he gave his consent thereto, and this is the escape alleged, &c.

To this plea there was a traverse, and issue to the Jury.

In support of the plea the defendant offered the following instrument.

Rutland, April 18th, 1801.

This certifies, that if Mr. *Silas Whitney* settles an execution against him on which he is imprisoned, in *Isaac Hobbs's* name, I agree, if the sum and costs, with the interest after judgment, is made to me by the 20th of *June* next, one hundred dollars in neat

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cattle at cash price, the other in good notes on demand to be delivered to me at or before the first of *June* next, *I will take no advantage of the bail.*

Witness my hand,

Daniel Marsh.

Attest, *Stephen Williams.*

It was conceded, that *Marsh* was the agent of *Hobbs*, and it was proved by the subscribing witness, that on this instrument being signed, *Silas Whitney* paid *Marsh* ten dollars, which was endorsed on the bail-bond, and departed the liberties of the prison in his company. The question made is, whether the contract in this instrument should discharge the bail.

The Court, in charge to the Jury, observed, that the statute which provided for the admission to the liberties of the prison, is a humane act, enacted for the relief of the unfortunate; that many benevolent persons, as in the present case, to relieve a prisoner from close confinement, would execute a bail-bond *as surety*, without counter security, or any reliance except upon the fidelity of the prisoner, and this in cases where to respond the judgment an escape would operate the ruin of their fortunes. It would be an injury to poor prisoners, and tend to defeat the merciful intent of the statute, if their creditors could in any way induce them to depart the liberties, and saddle their debts on their bail.

The Court considered, that the provision in the instrument read in evidence, that no advantage should be taken of the bail until a certain day, implied a consent in the plaintiff's agent, which is his own con-

sent, that the prisoner might depart the liberties, and the Court would have it understood as law, that whenever a prisoner for debt is admitted to the liberties of the prison, and a bond with surety taken to indemnify the sheriff, the least inducement, or even countenance given by the creditor to the departure of the prisoner from the liberties, is a good bar to an action on the bail-bond, when the escape is assigned in breach.

Verdict for the defendants.

John Cook, for plaintiff.
Nathan B. Graham, for defendants.

BOWNE et al., Appellants,
against
JOHN A. GRAHAM and NATHAN B. GRAHAM,
Appellees.

TRESPASS *quare clausum fregit.*

In an action of trespass *quare clausum fregit* against two, the regular levy of an execution upon a judgment rendered against one of the defendants who had quitted possession before, and never intermeddled with the possession since the levy, cannot be given in evidence against the other, who was in adverse possession at the date of the levy, and has not surrendered his possession since.

This was an action of trespass on the freehold. The plaintiffs, in their declaration stated, that on the 5th of *July*, A. D. 1801, the defendants *vi et armis* broke and entered their close, being the lot of land and the dwelling-house thereon, on which the said *Nathan B. Graham* now lives in *Rutland*, &c. and having so entered, with like force plucked and destroyed their apples, pears and peaches on their trees on said lot growing, and consumed and eat their

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garden stuffs growing on said lot, and broke ten panes of glass, and converted a certain brass knocker to their own use, *et alia enormia*, with a *continuando* to the 26th of *February*, A. D. 1802, being the day of the teste of the writ.

The defendants pleaded severally not guilty, and issue to the Jury.

The counsel for the plaintiffs read in evidence a judgment rendered by the Circuit Court of the *United States*, holden at *Windsor*, within and for the District of *Vermont*, on the 5th day of *May*, A. D. 1801, in favour of their clients, against *John A. Graham*, for the sum of 2,704 dols. 49 cts. debt and costs, and the execution which issued on this judgment, with its levy on the 4th of *July*, 1801, on the premises, by *Thomas Leverett*, the marshal's deputy, who caused them to be appraised, and made record of his levy in *Rutland* town clerk's office the same day, and in the clerk's office from which the execution issued on the 18th of the same month.

It was conceded, that the plaintiffs made a demand of the possession of the premises of *Nathan B. Graham*, on the 6th day of *January*, A. D. 1802, who refused to deliver possession; and it appeared that *John A. Graham* had not been in possession since the year 1794. That *Nathan B. Graham* had held an adverse possession antecedent to the levy.

The question made is, whether the levy of the execution, and the consequent proceedings on the part of the plaintiffs, will show such a possession in them as will maintain an action *quare clausum fregit* against the defendants?

After argument, the Court delivered their opinion.

TYLER, Assistant Judge. The plaintiffs have brought their action *quare clausum fregit* against two defendants for trespass, done, as it is alleged in the declaration, on the 5th *July*, 1801, with a *continuando* to the 26th of *February*, 1802. The defendants have pleaded the general issue *severally*.

It appears that the plaintiffs recovered judgment against *John A. Graham*, one of the defendants, in *May*, 1801, and procured the land to be set off in part satisfaction of his execution on the 4th of *July*, 1801, by a regular levy. That the defendant *John A. Graham* has not been in possession since the levy, and no intermeddling with the close or tortious act is proved to have been done by him. That on the 6th of *January*, 1802, the plaintiffs demanded possession of the land levied upon from *Nathan B. Graham*, who refused to surrender his possession, which he has held adverse to the other defendant, antecedent to the levy, and adverse to the plaintiff ever since. So that the question which should be made is, whether the regular levy of an execution upon a judgment rendered against one of the defendants, who had quitted possession before, and never intermeddled with the premises since the levy, can be given in evidence to maintain an action *quare clausum fregit* against the other defendant, who has pleaded severally the general issue, and who was in adverse possession at the time of the levy, and has never surrendered his possession since?

It is an established principle, that before an entry and actual possession, one cannot maintain an action of trespass, though he hath *the freehold* in law. Therefore the books inform us, "that an heir before entry cannot have trespass against an abator, but a

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disseisee may have it against a disseisor *for the disseisin itself, because he was in possession*, but not for an injury after the disseisin." 2 *Roll. Abr.* 553.

This leads to the inquiry, what is the operation of the levy of our execution on lands; and this must be decided by a sound construction of our own statutes; for we can obtain little or no assistance from the writings of our *English* ancestors, as the *English* writ of *elegit* meddles only with the profits; but the levy of our writ of execution transfers the fee of the land, if held by the debtor.

How does it operate as against the debtor? Does it give the creditor possession as against him?

Vermont Stat. vol. 1. 323.

The third section of the act directing the levying and serving executions, in the latter clause enacts—"And all executions extended and levied upon any houses, lands, or tenements as aforesaid, with the return of the officer thereon, being recorded in the records of the lands of the town in which such houses, lands, or tenements, are situate, or in the office wherein deeds respecting the same are required by law to be recorded, and also returned into the office of the Clerk of the Court, or Justice of the Peace, from which such execution issued, and there recorded, shall, as *against* such debtor, his heirs or assigns, make a good title to the party for whom such estate was taken, his heirs and assigns for ever."

But the mere levy of the execution and record made, create only a conditional interest in the estate levied upon in the creditor, and give no possession; for the 5th section provides, that the real estate, thus levied upon, may be redeemed by the debtor in six months from the date of the levy, by tendering or pay-

ing the full sums of debt, damages and costs mentioned in the writ of execution, and the officers' fees thereon, together with interest thereon at the rate of twelve per cent. per annum; and the 6th section declares what shall be the operation of the levy, as it respects both creditor and debtor, "that no person or persons to whom any houses, lands or tenements shall be appraised and set off as aforesaid, *shall enter and take possession of the same until six months* after the execution shall have been extended; and if such estate shall not be redeemed in manner as above provided within that time, the person or persons to whom such estate shall have been appraised as aforesaid, are hereby authorized and empowered to enter and take possession without giving any previous notice to the person or persons in possession, in as full and ample a manner as though seisin and possession of the same had been delivered by the officer who served such execution, or could have been given by the person in actual possession, any law, usage or custom to the contrary notwithstanding. But although, at the expiration of the six months, the creditor, on non-payment of the redemption money may enter and take possession without any previous notice; yet he must make an actual entry, and take an actual possession, which the statute has empowered him to do, and which, if not done, he cannot have possession by implication of law. The right of possession is one thing, and that the statute has secured to the creditor as against the debtor and those who hold under him; but the actual possession must be taken by his own act; and if this be not done, he has not that possession which will enable him to maintain the present action. This actual entry must be without breach of

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the peace, or he himself is amenable to the law; and therefore the usual mode has been for the creditor to bring an action of ejectment, and obtain a legal and peaceable entry by a writ of possession; and the statute seems to countenance a resort to the law in case a peaceable entry is refused by the debtor or his legal representatives, by giving an action to the creditor for the mesne profits, and a right to tender their amount by the debtor in case the creditor does not take possession in bar to an action for the mesne profits, which clearly implies, that the Legislature did not consider that the possession accompanied the levy, or accrued to the creditor upon the non-payment of the redemption money. The creditor, then, by the mere operation of the levy of an execution on lands, on the expiration of the statute term without redemption, does not obtain possession of the lands, and cannot maintain trespass grounded on such process.

But what is the operation of the levy of an execution on lands, as relative to strangers to the judgment? The statute seems to have decided this by confining its operation in a certain case to "the debtor or debtors, or their legal representatives remaining in possession."

A creditor may levy his execution at will upon any real property which he esteems to be the debtor's. The 9th section of the statute contemplates cases where execution may be extended on lands not the property of the debtor, and provides a remedy by allowing the creditor an *alias* execution on his judgment on process of *scire facias*. It would be absurd to suppose that such levy could decide the rights of others, strangers to the judgment, and not holding under the debtor.

It therefore appears to me, that the plaintiffs in this action not having been in possession by actual entry, or by operation of the levy of their execution, cannot maintain their declaration of trespass *quare clausum fregit* against either of the defendants, and more especially against *Nathan B. Graham*, who was an entire stranger to the creditor's judgment, and held a possession antecedent to the levy, and adverse to both the creditor and debtor. If the plaintiffs wish to try the validity of their title, accruing from the levy, as against either, they should resort to an action of ejectment.

JACOB, Assistant Judge. I agree with Judge TYLER. The object of the plaintiffs' attorney in bringing this action, was probably to try the title under it; and if this action had been brought solely against *John A. Graham*, the judgment debtor, he would have been estopped from showing title against the levy; but as it appears he has never been in possession since the levy, and has committed no tortious act, this action will not lie against him. If the plaintiffs wished to try the validity and operation of their levy against a stranger to their judgment, who holds by adverse possession, they should have resorted to an action of ejectment.

Chief Judge. It is much to be desired that the gentlemen of the bar would advise their clients, who claim title to land, to institute an action of ejectment against all in possession. A resort to other actions, by which the title may be collaterally tried, is certainly not beneficial, as the verdicts are not conclusive as to the title, even against the trespassers.

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If the title might be tried in the present action, which seems to have been the object of the attorney who drafted the declaration, a verdict for the plaintiff would only sound in damages; and a common writ of execution would issue, not a writ of possession, which can only follow the action of ejectment.

Plaintiffs nonsuited.

Cephas Smith, junior, for the plaintiffs.
Nathan B. Graham, pro se et al. def.

The Same *against* JOHN A. GRAHAM.

In case on the statute to recover the mesne profits of land levied upon by execution, the defendant is not estopped from showing that he had no title to or interest in the land.

CASE on the statute for mesne profits.

The plaintiffs declare, that by the consideration of the Circuit Court of the *United States*, holden at *Windsor* on the 5th day of *May*, A. D. 1801, they recovered judgment against the defendant for the sum of 2,704 dollars, damages and costs; that they took out their writ of execution, and delivered the same to the marshal's deputy, who, on the 4th of *July* following, levied it on a certain lot of land, (butted and bounded,) with the buildings thereon, in *Rutland*, &c. and perfected their levy by the 18th of the same month, by recording the process in the proper offices; that the defendant failing to pay the redemption money within the statute term of six months, the title of the land vested in them in fee by operation of law; that the defendant has continued in possession of the land from the day of the

date of the levy to the day of the impetration of the writ; that the land and buildings have yielded rents, profits and improvements to a large amount, from the 4th day of *July*, 1801, to the 4th day of *January*, 1802, being the mesne profits from the time of the levy of their said execution, until the expiration of six calender months ensuing, being the time allowed by law for the said defendant to have redeemed the same; that after having duly notified the defendant, they have caused the value of said rents, profits and improvements to be justly appraised, according to law, by three judicious and disinterested freeholders, who have appraised the same at the sum of 31 dols. 50 cts. with 3 dols. 25 cts. expense of appraisal, amounting in the whole to the sum of 34 dols. 75 cts. a certificate of which appraisal, under the hands of said appraisers, they have here ready in Court to be shown, when, &c.; that they have demanded the said last-mentioned sum of the defendant, who refused and neglected to pay the same; and that an action founded on the statute, entitled, an act directing the levying and serving executions, passed 7th day of *March*, 1797, hath accrued to them to have, receive, demand and recover the said sum of 34 dols. 75 cts. with additional damages and costs, &c. for which they bring suit, &c.

The defendant pleaded the general issue, which was joined and put to the Jury.

The plaintiffs showed a certified copy of their judgment, and of the levy of their execution, and the record of the process was conceded. They then showed a regular notification to the defendant, to agree upon the amount of the rent and profits, on the 9th of *January*, 1802, and an application to Mr. Justice

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Osgood, and his appointment of appraisers, with their certificate of the amount and expense of appraisal, as set forth in the declaration.

It was conceded, that the defendant went into possession in the year 1789, and continued in possession until the year 1792; but it appeared in evidence, that the defendant had not been in actual possession of the land since the year 1796. The plaintiff now attempted to show that *Nathan B. Graham*, who was in possession at the date of the levy, and continued in possession during the time the mesne profits accrued, held under the defendant.

The defendant then offered to show an adverse possession in *Nathan B. Graham*. That on the 14th of *November*, 1795, by deed of that date, duly executed and recorded, the defendant conveyed the land to *Samuel Mattocks* in fee, who took actual possession. That on the 15th of *March*, 1797, *Mattocks*, by deed duly executed and recorded, conveyed his title to *John Robbins*, who, on the 7th of *November*, 1798, passed the fee by regular conveyance to *Stephen Williams*, who put *Nathan B. Graham* into possession, where he has continued under *Williams* ever since.

The plaintiffs' counsel objected to this testimony, insisting, that the defendant, by the operation of the levy, was estopped from showing title against the plaintiff.

Sed per Curiam. In an action of ejectment, or in trespass *quare clausum fregit*, where the validity of title may be brought in question, the defendant is estopped from impeaching his own title to the lands, which passed by the levy to his judgment creditors;

but the evidence offered is not brought directly to impeach the defendant's former title.

This is an action for the mesne profits, which accrued from the defendant's use and occupancy of the land, from the time of the levy of the execution to the expiration of the six months allowed by the statute to the defendant to redeem. The defence is, that the defendant has not been in possession during such time. The plaintiffs attempt to rebut this by showing, that although not in actual possession himself, he was by his tenant. To show that the actual possessor of the land was not his tenant, but held under a stranger, is certainly good showing by the defendant.

A judgment creditor may levy his execution at will on any lands which he esteems to be the debtor's. But if he levies on another's land, and institutes a suit for the mesne profits against his judgment debtor, surely it is a good defence in such action, to prove that the defendant never had *any interest* in the land, but that the fee is in a stranger; for if the defendant should be estopped from such showing, and upon after trial in ejectment this should prove to be the case, and the creditor should obtain an *alias* execution on *scire facias*, grounded on the mistake in his levy, under the 9th section of the act "directing the levying and serving executions," and the debtor should have had judgment rendered against him for the mesne profits of the land levied upon by mistake, he would suffer an injury in the face of common justice, and yet of doubtful remedy.

If an action of ejectment is brought against the debtor to recover the lands levied upon, he might

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be estopped from showing that the fee is in another, because, whatever estate he held in the land levied upon would pass to the creditor by the levy; for as the fee passes by the operation of the levy and non-redemption, all his lesser tenures pass. *Majus continet in se minus.*

But a creditor cannot, by the levy of his execution on the lands of a stranger, charge the debtor with the mesne profits, even although the debtor should be in actual possession, and he might *possibly* maintain ejectment *as against him.*

Let the evidence be admitted.

The plaintiff's counsel now offered to read a mortgage deed of the land executed by the defendant to the plaintiff *Bowne, January*, 1794, antecedent to the defendant's deed to *Mattocks.*

Sed per Curiam. The mortgage deed cannot bear on the present issue. If one of the plaintiffs has a conditional estate on the land by mortgage, he will be secured in his rights by application to the Court of Chancery, and by a decree can obtain the sum for which the land is pledged, or on non-redemption render his estate absolute. The deed cannot be admitted.

The plaintiffs had leave to enter a nonsuit.

Cephas Smith, junior, for the plaintiffs.
Defendant, *pro se.*

BELL, Sheriff, Appellant,
against
DARIUS CHIPMAN, Appellee.

ABATEMENT. This was a plea in abatement to the writ.

The Court will not abate a writ of summons directed to and served by a deputized person, because the authority signing it omits tomention *particularly* all such known officers as might legally serve it if seasonably to be had.

First. For that the writ was served and returned by *J. W.* as a person especially deputized, when in fact the said *J. W.* is not legally deputized and authorized to serve and return the same.

Secondly. That the said *J. W.* is not a meet and proper person to be deputized to serve and return any process.

Demurrer.

It appeared that the writ was a summons to the defendant to appear, &c. The deputation was made by the Clerk of *Rutland* County Court, who signed the writ, and was *within* the writ in the words following:

State of Vermont.

Rutland, ss. To the high bailiff of the County of *Rutland*, or his deputy, or, for want of such officers seasonably to be had, to *J. W.* junior, late of *Pawlet*, now of *Rutland*, in the County of *Rutland*, to serve and return according to law.

Chipman, for the defendant, read part of the 24th section of the judiciary act—"And every writ and process, issued as aforesaid, shall be directed to the sheriff, his deputy, or some constable of the town where the service is to be made; except where both sheriff and constable are parties, or interested; in which case the writ or process may be directed to,

Vermont Stat. vol. 1. p. 61.

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and the service made by, the high bailiff, or any disinterested constable within the County, who shall be therein named. And in case no such sheriff, deputy-sheriff, or other officer as aforesaid, can be seasonably had, the writ or process may, by the authority issuing the same, be directed to an indifferent person, being named;" and insisted, that where the authority signing a writ deputizes an indifferent person, the deputation should, on the face of it, show his power to deputize, or it is void. The Clerk of the County Court, in this instance, had no power to deputize, excepting where the high bailiff and his deputies, *and the constable of the town where the service was to be made*, could not seasonably be had. The Clerk has deputized *J. W.* to serve and return the writ, in case *such officers*, to wit, the high bailiff and his deputy, could not seasonably be had, but has omitted to direct the writ to be served by the constable of *Rutland*, and therefore the deputation is illegal, for the high bailiff and his deputies might not seasonably be had, in which case, by the terms of the deputation, *J. W.* might serve and return the writ; but the service would be illegal, if the constable might be seasonably had to do it.

Mr. *Chipman* said, he should not press the second exception in abatement, as it appeared to have been inserted by the defendant in the plea, in a moment of irritation, to which the most philosophic minds are subject, when he imagined himself insulted by having process served upon him by a very indigent person, and perhaps through poverty not so fashionably attired as those with whom the defendant was accustomed to associate.

Curia. The question is, whether a deputation to serve and return a writ *of summons* in civil process under the 24th section of the judiciary act be illegal, if the authority signing it omits to mention particularly all such known officers as might legally serve it if seasonably to be had.

The Court distinguish between a writ of summons and a writ of attachment, where the person may be arrested, or the property taken. The Court would not countenance a resort to deputized persons to serve writs of attachment, excepting in cases of great necessity, and those clearly within the letter of the statute, and where both the deputation and the service clearly comport with its provisions. But where the process is by mere summons, and no possible injury can be shown from the service having been made by a deputized person rather than by a known officer, the Court will not quash a process for a mere technical omission in the clerk signing the writ.

The legislative will respecting clerical defects, has been fully expressed by our statute of jeofails; and this Court have ever discountenanced exceptions to mere clerical errors. They wish to emulate the character given to the *English* Judges in the reign of *George* II. by Serjeant *Wilson*, in the case of *Murray* v. *Wilson*. When speaking upon the subject of pleading, he says, "Our learned Judges in these later and happier days, have rather been *astuti* to do justice than to find out little slips in pleading."

Judgment of Court, that the writ does not abate.

Cephas Smith, junior, for the plaintiff.
Daniel Chipman, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, MAY ADJOURNED TERM, A. D. 1803.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

JOHN HARRINGTON, Reviewer,
against
CHARLES KINGSBURY, Reviewee.

It is good cause for continuance on part of the plaintiff under a rule to pay costs, that he has taken a deposition in another state the caption of which proves *defective*, if the subject matter of the depoistion is not *primarily* necessary to maintain his declaration, but has been rendered necessary to rebut testimony adduced by the defendant, and it has been exhibited to the defendant's counsel, who have refused to waive exceptions to the caption.

MOTION for continuance.

The plaintiff's counsel moved for a continuance, stating, that their client had at great expense procured the deposition of a material witness, who re-

sided in another State, at great distance from the Court. That upon the deposition's being unsealed in Court, and submitted to his counsel, it was discovered that the caption was defective. That they had communicated the deposition to the defendant's counsel, and proposed to them to proceed in the trial if they would waive exceptions to the caption, which they had declined. That this operated a surprise on their client, who could not be chargeable with laches on account of the irregularity of the caption, as at the time of taking it he was *inops consilii*, and the deposition was taken in a State where this mode of testimony was not usual.

The defendant's counsel urged, *e contra*, that the plaintiff must always be prepared for trial at his peril. That he should have been furnished with evidence to maintain his declaration even before the essoin day. That it would operate an extreme hardship upon their client, to be kept in Court term after term, through the laches or even the misfortunes of the plaintiff.

It was replied by the plaintiff's counsel, that this deposition was not in the commencement of the suit necessary, but had been made so by evidence introduced by the defendant at a former trial, which the testimony in the deposition was brought to rebut.

Curia. The Court having examined the deposition, and finding that the subject matter of it applied in rebuttal of the defendant's evidence, and was not necessary primarily, but only collaterally to support

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the plaintiff's declaration, ruled that the cause should be continued, but observed, that although the defect in the caption was not owing to the laches, but to the misfortune of the plaintiff, it was not just that he should saddle his misfortune upon the defendant. They should therefore make the rule conditional that the plaintiff be allowed a continuance upon his paying to the defendants his taxable costs for this present term.

Cause continued.

Darius Chipman and ——— ———, for plaintiff.
Daniel Chipman and *Nathan B. Graham*, for defendant.

AMOS SANDFORD, Appellant,
against
SAMUEL ROSE and another, Appellees.

An action for fraud in the sale of land may be supported by *parol* testimony, and it is not necessary that the fraud should be apparent on the deed.

ACTION for fraud in the sale of land.

Case made for the opinion of the Court.

The case stated a colloquium between the plaintiff and the defendants respecting the purchase of a farm. The defendants owned a farm, and proposed to sell it to the plaintiff, asserting that it contained one hundred and fifty acres. They then showed him boundaries, which contained that quantity, and the plaintiff paid them a certain sum per acre. In describing the lands in the deed, which contained covenants of seisin and warranty, they described boundaries which only included one hundred acres, and concluded the de-

scription with "*be the same more or less.*" The question submitted is, whether the plaintiff can show the colloquium and the deceit in pointing out the wrong boundaries by *parol* testimony in an action for fraud in the sale of the land, or whether he should not rely for redress on action upon the covenants of the deed, or by application for relief in Chancery.

The defendant's counsel read the 4th section of an act regulating the conveyances of real estate, and for preventing frauds therein, "That no action shall be maintained upon *any agreement* hereafter to be made for the sale of lands, tenements, or hereditaments, or any interest therein, or concerning them, unless the agreement upon which such action shall be brought, *or some memorandum thereof be in writing*, and signed by the parties to be charged therewith, or signed by some other person thereunto legally authorized, by writing;" and insisted, that the plaintiff was estopped by the statute from adducing any evidence not reduced to writing, and signed by the parties or their agents. That whatever was said or done by either party in maturing the contract, yet the deed showed the contract as eventually adjusted and concluded upon by the parties to it. That the plaintiff must now rely on its covenants. That if he has been injured in a mode not embraced by the covenants, he must apply for relief in Chancery, and not by action at common law.

Vermont Stat. p. 189.

Langdon, for the plaintiff, observed, That the statute read is in substance founded on the *English* statute of frauds, passed 29th of *Charles* II. chap. 3. That in the *English* Courts, actions for fraud in the

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sale of lands have been supported by parol testimony, and the whole current of decisions favour it since the passing that act. That in matters of fraud the Courts of Law have a concurrent jurisdiction with the Court of Chancery. Lord *Mansfield*, in the case of *Bright, Executor of Hannah Crisp, Widow*, v. *Eynon*, says, that FRAUD OR COVIN may, in judgment of the law, avoid every kind of act. "What circumstances and facts amount to such fraud or covin," is always a question of law. Courts of Equity and Courts of Law have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating truth, and to give more complete redress. 1 *Burr. Rep.* 395, 396. Here the doctrine extends to even setting aside the deed in the Law Courts.

By a sound construction of our own statute, independent of the *English* decisions, it is apparent, that the Legislature did not intend to estop the party injured by a fraud in the sale of lands from maintaining his action, unless the fraud was evident on the face of the written instrument. The words are, That no action shall be maintained on any agreement, &c. Here the action is not brought upon the agreement, but for a fraud, by which the plaintiff has been induced to pay his money for fifty acres of land, to which no title has passed by the agreement or deed.

Curia. (JACOB, Assistant Judge, *absente.*) The Court are of opinion, that the evidence may be well admitted. The construction of the statute "regulating the conveyances of real estate, and for the prevention of frauds therein," contended for by the de-

fendant's counsel, cannot be correct; for it would go to convert a beneficial statute, made expressly for the prevention of fraud, into an engine of fraud.

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The evidence will be admitted.

The cause was continued for trial, and afterwards, on the decease of *Rose*, was accommodated.

Chauncey Langdon and *Darius Chipman*, for plaintiff.

—— ——, for defendant.

CUSHENDEN and RUTHERFORD, and another,
against
HARMAN, BOARD, and REYNOLDS.

Demurrer to an action of debt on a recognisance in replevin.

DEBT on a recognisance in replevin.

Declaration.

Attach the defendants to answer unto *George Cushenden* and *John Rutherford*, late merchants, trading in company under the name and firm of *Cushenden & Rutherford*, in *Lansingburgh*, in the County of *Rensselaer* and State of *New-York*, and *Ebenezer Canfield*, of *Poultney*, in the County of *Rutland*, in a plea that they the defendants render to the plaintiffs the sum of two thousand five hundred dollars of the current money of this and the *United States*, which they the defendants justly owe and unjustly detain, for this, to wit, that whereas at *Castleton* aforesaid, on the fourteenth day of *March*, in the year of our Lord 1798, the defendant *Reynolds* and one *David Stewart*, then of *Castleton*, in the

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County of *Rutland* aforesaid, sued out their certain writ of replevin, the date whereof is the day and year last aforesaid, signed by *Chauncey Langdon*, then one of the Justices of the Peace within and for the said County of *Rutland*, and made returnable to the County Court, then next to be holden at *Rutland*, within and for said County, on the third *Monday* of *November*, 1798, and upon that occasion, and agreeably to the statute in such case made, on the same day and year last aforesaid, personally appeared the defendants before *Chauncey Langdon*, Esquire, Justice as aforesaid, and then and there acknowledged themselves jointly and severally bound and obliged, and firmly holden unto the said *John*, *George*, and *Ebenezer*, their executors and administrators, in the full and just sum of two thousand five hundred dollars, of the current money aforesaid, to be levied of their and each of their goods, chattels, lands and tenements, and for want thereof upon their and each of their bodies, if default should be made in the following conditions: the conditions of which recognisance are such, that if the above bounden *Reynolds* and *David Stewart* shall prosecute their said writ of replevin, now here prayed out against the said *Cushenden*, *Rutherford*, and *Canfield*, to effect, or in default thereof redeliver the estate to be replevied as in said writ of replevin mentioned, to the said *John*, *George*, and *Ebenezer*, from whom said estate is to be taken, and answer all damages occasioned by issuing this writ of replevin, then this bond of recognisance to be void, otherwwise to be of full force and effect, as by said bond of recognisance, ready in Court to be produced, may fully appear; and for this, that said writ of replevin was directed to the sheriff of

Rutland County, his deputy, or either constable of *Poultney*, in said County, to serve and return according to the precept thereof, and which writ contained the estate particularly to be replevied, and to be delivered to the said *Stewart* and *Reynolds*, and the same writ of replevin, on the 15th day of *March*, 1798, the said *Stewart* and *Reynolds* put into the hands of *Joel Hamilton*, then, ever since, and still a legal deputy under *Jonathan Bell*, Esquire, then, ever since, and still sheriff within and for the County of *Rutland* aforesaid, to serve and return according to law, and afterwards, at *Poultney* aforesaid, on the day and year last aforesaid, the said *Joel Hamilton*, being sheriff's deputy as aforesaid, replevied and took the estate in the said writ of replevin mentioned, from the plaintiffs, and the same delivered to the said *Stewart* and *Reynolds*, and also left with *John Cook*, Esquire, attorney for the said *Stewart* and *Reynolds*, a true and attested copy of said writ of replevin, with his return thereon endorsed, and afterwards, to wit, at the *November* term of the County Court, begun and holden at *Rutland*, within and for the County of *Rutland*, on the third *Monday* of *November*, 1798, the said *Stewart* and *Reynolds* entered their said writ of replevin in said Court; and such proceedings were had in said action of replevin, that the same was continued in said Court until the term of said Court holden at *Rutland* aforesaid, within, &c. on the third *Monday* of *November*, A. D. 1800, at which said term of said County Court, the said *John*, *George*, and *Ebenezer* recovered judgment in said action of replevin against the said *Stewart* and *Reynolds* for their costs, and that the estate mentioned and particularly described in

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said writ of replevin, should be redelivered to the said *John*, *George*, and *Ebenezer*, the now plaintiffs, as by the files and records of said County Court, ready here in Court to be shown, may appear. Now the plaintiffs in fact say, that the said *Stewart* and *Reynolds* did not prosecute their writ of replevin against them the said *John*, *George* and *Ebenezer*, to effect, nor have they redelivered the said estate, replevied as aforesaid, to the said *John*, *George* and *Ebenezer*, nor to either of them, nor have they answered any or all damages, occasioned by the issuing said writ of replevin, nor have the defendants paid the sum contained in said bond of recognisance, by reason of which an action hath accrued to the plaintiffs, to have and demand of the defendants the aforesaid sum of two thousand five hundred dollars. Nevertheless the defendants have neglected and refused, and still do neglect and refuse, to pay to the plaintiff the said sum of, &c. or any part thereof, although to pay the same they the defendants have been often thereunto requested, which is to the damage of the plaintiffs, as they say, 3,000 dollars, for the recovery of which, with just-costs, the plaintiffs bring this writ.

To this declaration the defendants demurred generally, and assigned for causes of demurrer,

First. That the plaintiffs have not set forth any right in themselves to the estate replevied.

Secondly. That they have not, in their declaration, described the estate, goods and property replevied.

Thirdly. That they have not alleged any *especial* demand for the redelivery of the estate replevied.

The cause was argued by *Cook*, for the plaintiffs, and *Langdon*, for the demurrants.

The Court delivered the following opinion.

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Opinion of the Court.

Curia. The plaintiffs declare upon a bond of recognisance entered into by the defendants before a Justice of the Peace upon the issuing of a writ of replevin, in which *Parker Reynolds* and *David Stewart* were plaintiffs, and the present plaintiffs were avowants, conditioned that the plaintiffs in replevin should prosecute their writ to effect, and in default and upon award of redelivery of the estate replevied, to redeliver the same, and answer all damages occasioned by issuing the writ. The declaration then alleges, that the estate was replevied by virtue of the writ. That the writ of replevin was entered in the County Court to which it was made returnable, and that, after several imparlances, judgment was rendered against the plaintiff in replevin, and a return of the estate replevied awarded, and so the plaintiffs say, that *Stewart* and *Reynolds* did not prosecute their writ to effect, and did not, &c. They then allege a *general* request, and neglect and refusal to pay the bond, &c.

The defendants demur generally, and take several exceptions to the declaration, which are now to be considered.

First. That the plaintiffs have not set forth in themselves any right to the estate replevied.

The declaration sets forth, that the writ of replevin was served by taking the estate replevied from the now plaintiffs, and delivering it to *Stewart* and *Reynolds*, the plaintiffs in replevin.

When goods are taken in replevin, the plaintiff may show, not only a general property, which every

When goods are taken in replevin, the plaintiff may show not only the *general property* which every owner hath, but also a *special property*, such as a person has who hath goods pledged to him, &c.

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owner hath, but also a special property, such as a person has who hath goods pledged to him, or who hath the cattle of another to manure his lands, &c. *Bac. Abr.* vol. 6, p. 69. And on the other hand the defendant, in his avowry, need not show a right to the property in himself; for if he has the possession, which must be if the property is taken from him by the writ, he ought to have it returned to him for the benefit of the right owner. *Comb.* p. 477. *Barret* v. *Scrimshaw*. But whatever may be the present plaintiffs' interest in the property replevied, it cannot now come in issue; for it has been already decided in the action of replevin, and that is the gist of the breach of the bond of recognisance as declared upon. The Court therefore consider, that the plaintiffs have in their declaration set forth a sufficient interest in the property replevied, to maintain the present action.

The second exception is, that the plaintiffs have not in their declaration described the estate replevied.

In debt on a recognisance entered into for the prosecution of a writ of replevin, if the defendants would avail themselves of the return of any part of the property replevied, so that the identity, quantity, and quality of the property replevied, becomes necessary to be spread on the record, or to use the same for any other purpose in pleading, they should crave oyer of the record in the action of replevin.

The declaration describes the property replevied by reference to the writ of replevin, "and took the estate in the said writ of replevin mentioned," and again the declaration makes profert of the records and proceedings of the County Court in the action of replevin. In *England* the action upon a replevin bond is a *scire facias;* but with us, in case of a breach of the replevin bond, an action of debt is brought upon it, reciting the proceedings in the action of replevin in breach, and is so far of the nature of a *sci. fa.* that it is connected with and predicated upon a former judgment, a reference to which by

profert is a sufficient certainty for the Court to proceed in rendering judgment. *Id certum est quod certum reddi potest.* What is proferted in a declaration may be craved, and shall be read in *oyer*. If the defendants inclined to avail themselves of the return of any part of the property replevied, so that the identity, quantity, and quality of the property replevied became necessary to be spread particularly on the present record, or to use the same for any other purpose in pleading, they should have craved *oyer* of the County Court records.

The Court therefore consider, that the second exception is not well taken.

The last exception is, that the plaintiffs have not alleged any especial demand of the property replevied.

The bond of recognisance, as set forth in the declaration, combines the *English plegii de prosequendo*, by common law, and *plegii de retorno habendo*, by the statute of *Westminster* 2. cap. 2. with a clause of indemnification from all damages resulting from the issuing the writ. In *England* the pledges to prosecute and to return the property in case, are taken to the sheriff, and the *sci. fa.* issues in his name against the pledges; with us the bond is taken to the avowants, and an action in the nature of a *scire facias* is commenced against the plaintiff in replevin, and his sureties in the name of the recognisee. In the elder country the writ *de retorno habendo* is not a returnable process, and seems only to be used to decide whether the property replevied be eloigned or not. For if the defendant hath a return awarded to him, and he sueth a writ *de retorno habendo*, and the sheriff returns on the *pluries, quod averia elongata sunt*,

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he shall have a *scire facias* against the pledges, &c. according to the statute of *Westm.* 2. (13 *Edw.* I. stat. 1.) and if they have nothing, then he shall have a *withernam* against the plaintiff's own cattle. *Fitzherbert's N. B.* 172.

By our practice, the writ *de retorno habendo* or *withernam* have not therefore been resorted to, but the usual mode has been when in replevin a return of the property has been awarded, with judgment for costs, to have recourse to an action on the bond, which, as it embraces in its covenants all the several injuries the avowants in replevin may have sustained, has been found to answer all the purposes of those writs, with others not included in them, excepting that in our practice no provision is made to ascertain on the record whether the property is eloigned or not, or is refused to be redelivered. It might, perhaps, be better in all cases to issue the writ *de retorno habendo* as against the plaintiff in replevin, and to procure a regular return by a proper officer, *quod catalla elongata sunt*, (which would be tantamount to a demand and refusal,) or that the sheriff had demanded the chattels of the plaintiff in replevin, which he refused to redeliver, and then recourse might be had to an action on the bond, waiving the writ *de withernam;* but since this is not the practice, we must endeavour to give such a consistency to the present practice as we are able. It has been usual to institute actions on recognisances in replevin, without alleging any especial demand. *Communis error facit jus.* The Court therefore consider, that in an action upon a recognisance, taken for the prosecution of a writ of replevin, where the redelivery

In an action upon a recognisance taken for the prosecution of writ of replevin, where the redelivery of the property has been awarded, it is not necessary to allege in the declaration a *special* demand of the property replevied.

of the property has been awarded, it is not necessary to allege in the declaration a special demand of the property replevied.

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Let judgment be entered, that the declaration is sufficient.

TYLER, Assistant Judge, *hesitante.*

Declaration sufficient.

John Cook, for the plaintiffs.
Chauncey Langdon, for defendants.

THOMAS MILLER, Appellant,
against
HENRY GOOLD, Appellee.

CASE upon a promise made to the sheriff's deputy to surrender the debtor during the life of an execution.

An action will well lie in the *name* of a deputy-sheriff, on a promise made to him by a third person, to surrender the body of a debtor within the life of an execution.

Summons *Henry Goold*, of, &c. to answer unto *Thomas Miller*, of, &c. deputy to the sheriff of *Rutland*, in a plea of the case, for that whereas, at *Rutland* aforesaid, on the 13th day of *April*, in the year of our Lord one thousand eight hundred and one, the plaintiff, as deputy-sheriff, received an execution in favour of *Othello Church* and *Isaac Church*, against *Jacob Goold*, junior, for the sum of sixty-eight dollars and forty-two cents, including damages and costs, taken out on a judgment recovered by the consideration of the County Court holden at *Rutland*, within and for the County of *Rutland*, on the third

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Monday of *March*, in the year of our Lord 1801, and afterwards, to wit, on the twenty-seventh day of the same *April*, the plaintiff was about to execute his office duly, as deputy-sheriff aforesaid, upon the body of the said *Jacob Goold*, junior, by virtue of said execution, and so being about to levy said execution, the defendant then and there, in consideration that the plaintiff would forbear to levy said execution upon the body of the said *Jacob Goold*, junior, agreed and promised the plaintiff that he would see the said *Jacob Goold*, junior, forthcoming to the plaintiff on the fourth *Monday* of *May* then next ensuing, at *Rutland* aforesaid, if the contents of the aforesaid execution should not otherwise be settled, paid and satisfied; and the plaintiff in fact says, that he, relying on the promise and agreement so by the defendant made as aforesaid, did forbear to levy said writ of execution on the body of the said *Jacob Goold*, junior, and the said execution remains unlevied, and in no part paid or satisfied, and that the plaintiff hath become accountable to pay to the said *Othello* and *Isaac* the contents of the said execution, yet the defendant his promise and agreement aforesaid not regarding, did not see the said *Jacob Goold*, junior, forthcoming on the said fourth *Monday* of *May*, then next ensuing the said twenty-seventh day of *April*, 1801, nor hath he paid to the plaintiff the contents of the said execution, but to do either hath neglected and refused, and still doth neglect and refuse, although often thereunto requested, by reason of which an action hath accrued, &c. *ad damnum*, 150 dollars.

And now the said *Henry Goold* comes and defends, &c. and pleads and says, that the said declara-

tion, and matter therein contained, are insufficient in law for him the said *Thomas Miller* to have and maintain his said action against him the said *Henry Goold*, to which said declaration the said *Henry* hath no need, nor is he obliged by the law of the land to make any or further answer, and this he is ready to verify, when, &c. Wherefore, for want of a sufficient declaration in this behalf, the said *Henry* prays judgment, and that the said declaration may be quashed, and the said *Henry* be hence dismissed, with his just costs; and for especial causes of demurrer, the said *Henry Goold* sets down the following, viz.

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First. That the said action is commenced by said *Thomas Miller* as deputy-sheriff under *Jonathan Bell*, Esquire, sheriff of said County of *Rutland*, upon an *assumpsit* for the forbearance to levy a certain writ of execution therein mentioned, and that by law said action, if any could be maintained, should be had only in the name of the sheriff, and not in that of any deputy-sheriff.

Secondly. That the consideration for the promise set forth in said declaration is wholly illegal, and from which no *assumpsit* can be raised in law, or if expressly made, the said promise cannot be supported in law.

Thirdly. That in and by said declaration it is not alleged, that the said *Thomas Miller*, as deputy-sheriff, or any other officer who might have right to *receive*, were ready at *Rutland* aforesaid, on the said fourth *Monday* of *May*, to receive the body of the said *Jacob Goold*, junior.

That it does not appear in and by said declaration, at which place, if any, within the town of *Rutland*

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aforesaid, the said *Jacob Goold* was to be surrendered to said deputy-sheriff, nor that the plaintiff, or any one in his name, demanded of the defendant to deliver the body of the said *Jacob Goold*, junior, to be charged with said writ of execution.

Then a general exception to the declaration for want of form. Wherefore the defendant prays judgment as aforesaid, and for his costs.

By his attorney,

Samuel Walker.

And now the plaintiff, in reply to the defendant's plea above pleaded, says, that his said declaration, and the matters and things therein contained, are sufficient in law for him to have and maintain his said action against the defendant, *absque hoc;* and the defendant not denying said declaration, or in any way answering the same, he prays judgment of the Court for his said damages and costs.

By his attorney,

Samuel Prentice.

Cook, for the demurrant. Our first exception in demurrer is in substance, that no action can be maintained for or against a deputy-sheriff for any official act, but must in all cases be commenced for or against the sheriff, as head of the department.

Vermont Stat. vol. 1. p. 307.

The statute regulating "the office and duty of sheriff, high bailiff, their respective deputies and constables," is explicit on this subject, and the whole course of practice has been conformable to it.

The second section enacts, That every person being so commissioned, shall be accounted the lawful sheriff of the County for which he is appointed, and shall have full power within his own County,

to serve and execute all lawful writs, processes and precepts to him directed, issuing from lawful authority; and do all things pertaining to the office and duty of sheriff, and shall have power in his County to appoint such number of deputies as the Judges of the County Court in such County shall from time to time limit and direct, which deputies shall have power to serve all processes, and to do all acts generally, which the sheriff is empowered or required by law to do and perform; and all acts, doings, and returns of such deputies shall be signed by them respectively as deputy-sheriff, and *shall be taken and deemed as the act of the sheriff appointing them;* and the sheriff shall in all things be amenable and responsible for the conduct of his deputies in office, and may take bonds or other sufficient security to indemnify him against the act or default of his deputy; and every deputy-sheriff shall, before he proceed in the execution of his office, cause his deputation and oath of office certified thereon to be recorded in the County Clerk's office of the same County; and if the sheriff shall, before such deputation expire, dismiss such deputy, or revoke any such deputation, such revocation shall be recorded in such County Clerk's Office, and all the acts and doings of any such deputy-sheriff before his deputation and oath of office shall be recorded as aforesaid, shall be null and void in law.

Provided always, That no sheriff shall be amenable criminally for the conduct of his deputy, other than for fines and amercements, for neglect of duty.

Here it is explicitly declared, that all acts and doings of the deputy, excepting such as are criminal,

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shall be deemed and taken as the act of the sheriff appointing them.

The provision in the statute, that the sheriff may take bonds of indemnity against the acts or defaults of his deputy, affords a strong presumption that the Legislature intended in all cases that the action should be brought for and against the high sheriff; for if the action might be brought against or for the deputy, he must be considered alone responsible; and whence the necessity of the sheriff's taking bonds of indemnification of him?

The practice has uniformly been to bring suit in the sheriff's name for all official contracts made with his deputies. In the case of goods attached on mesne process, or taken by execution and receipted, to be returned to respond the judgment, or to be vended on execution, the receipt always runs to the deputy by name, but has always been prosecuted in the name of the high sheriff. So where goods attached or levied upon have been eloigned from the deputy, the action has always been maintained in the name of the sheriff. A variety of other cases may be put, but it is unnecessary to state particular cases, where the practice must be acknowledged to have been uniform, and conformable to an express statute.

There is a great and obvious propriety in the statute. The sheriff has the sole power to appoint his deputies, and to remove them from office at his pleasure. He may or may not appoint men of responsibility. He may take bonds with security, or waive their obligations of indemnity. The deputy is a creature of the principal, who the statute says shall be amenable, and responsible for the acts and doings of his servant; and it is highly reasonable, that this

mere automaton of the sheriff should never appear in any suit accruing from his official acts but by his master and maker, and that the good people of the State should consider, that however incorrectly the sheriff's deputies may conduct, when their conduct is subjected to judicial investigation, they have only to do with the sheriff's department, as represented by the high sheriff, its legitimate head.

If it should be considered, that the official contract of the deputy-sheriff may be prosecuted in his name, and the practice should generally prevail, defendants who may recover against such deputies, may often find that they have been put to great expense without any ability in the plaintiff to respond the costs; for if the action can be maintained in the name of the deputy, and on the merits of the case the judgment should be against the deputy, it will not be contended, that in such case a subsequent action will lie for such costs against the sheriff.

But if the action is correctly brought in the name of the deputy-sheriff,

Our second exception is, that the contract is illegal, and no recovery can be had upon it. We believe that there is no position better established than that a plaintiff cannot recover upon an illegal contract. The reason given is, that he who seeks for justice must first do justice; as in the case of *Webb* and *Bishop*, before Lord Chief Baron *Reynolds*, cited in *Buller's Nisi Prius*, p. 16, where, in an action for five guineas on a boxing-match, the Judge held it an illegal consideration, and the plaintiff was nonsuited. So, in the same page, 146. it is laid down, under the authority of *Lowax*, p. 174. "If the consideration be illegal, it will not uphold an *assumpsit*;

Riley's edit. 1806.

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as where the defendant, in consideration of 20*s.* assumed to pay 40*s.* if he did not beat *I. S.* out of such a close." But what is more in point, it is expressly in 3 *Co.* p. 44. that if a sheriff or gaoler shall let go a prisoner, and *take a promise* of him that he shall come again by such a day, this will be an escape, albeit that the prisoner come again by the day." Why was this considered an escape? Because the contract was illegal. But the case of *Barnard* v. *Crane*, decided in *Rutland* County, *July* adjourned term, A. D. 1802, settled the point in this State.

Vide vol. 1. p. 457.

Curia. The decision in the case of *Andrew Barnard* v. *Lemuel Crane*, went upon the ground that the contract was *malum in se*; but too much time need not be consumed in showing, that the Court will not sustain an action upon an illegal contract. The main question will be, is the contract declared upon illegal? Proceed to show, that it is either *malum in se* or *malum prohibitum.*

Cook. This is no arduous task. It is laid down in the 6th of *Bacon's Abridgment*, p. 181. "If the sheriff, for the ease and enlargement of a prisoner, takes a promise to save him harmless, that is within the statute, being within the same mischief, though the statute speaks only of bonds. Here a statute, to wit, that of the 23d *Henry* VI. c. 9. which declared bonds taken by the sheriff in contravention of his official duty void, is construed to extend to verbal promises of the like nature; and it is added, that "*such promise is void by the common law.*" The reason is obvious. The law considers every contract illegal, which is made by a public officer against

the duties of his office. The *præcipe* in the writ of execution was to collect the debt, or to imprison the debtor. The deputy-sheriff had it in his power to arrest and imprison the debtor. It was his official duty so to have done; but in dereliction of his duty he contracted with the defendant that he would omit to do it. The law commanded him to *arrest* and *imprison*. The contract is, that *he shall not arrest and imprison*, and is expressly against law and the duties of his office.

Our third exception to the declaration branches into several particulars.

First. That the declaration does not allegate that the plaintiff was ready to receive the body of the debtor on the day the defendant promised to surrender it.

Secondly. That no place within the town of *Rutland* is specified at which the body of the debtor was to have been surrendered; and,

Thirdly. That no demand is alleged to have been made by the plaintiff of the defendant to surrender the debtor.

Whenever a promise is made to do a specific act on action upon the failure of such promise, if the act be of such a nature as that it was necessary that the plaintiff should do something on his part, without which the defendant could not do such act, it is indispensably requisite that the plaintiff should set it forth in his declaration; for it is absolutely necessary that he should prove that he was himself ready and prepared to do such act. Natural justice requires this. So if I promise to deliver a chattel to a person at a certain time, or to erect a building for another, he finding the materials, if he brings suit against me

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for non-performance, it is necessary that he should prove that he was ready at the time to receive the chattel, or that he had his materials prepared for me to erect the building; and whatever it is necessary substantially to prove, it is necessary formally to allege.

The promise, as set forth in the declaration, seems void in its nature; for it specifies no particular place in the shire town at which the debtor's body was to be surrendered by the defendant. As no particular place was designated in the contract, some place ought to have been pointed out by *innuendo*, to wit, the most reasonable place, otherwise we are precluded from an available defence by the vagueness of the contract; for on the superficies of an extensive township, we may have been at one place ready to surrender the body of the debtor, whilst the plaintiff may have been at another; and it would have been no good plea in bar to state that we were present at a place which suited our convenience, or which we considered the most reasonable, if the plaintiff was not there to receive it; and this leads us to the third branch of our last exception, that some especial demand should have been alleged to have been made by the plaintiff for the delivery of the debtor's body, on the day mentioned in the contract, which demand being alleged and proved, would have supplied the deficiency in the contract. When a contract is defective in some more inconsiderable part, as where money is to be paid or where goods delivered, the law supplies the deficiency by deciding that the most reasonable time and place shall be considered as the time and place intended by the parties; but, as in the present case, where one place within the town of *Rutland*

cannot be considered more reasonable than another for the surrender of the debtor; or in any case where one place cannot be considered more reasonable than another, the law renders it incumbent on the plaintiff, who prosecutes for a breach of the contract, to point out the place in which the contract is to be fulfilled; and this is to be done by a personal demand of the defendant, previous to bringing his suit; and this demand, as necessary to be proved, it is necessary to allege in the declaration.

Prentice, for the plaintiff. It will be observed, that the statute read renders the sheriff "amenable and responsible for the conduct of his deputies in office," "provided that he shall not be answerable criminally, other than for fines and amercements for neglect of duty;" "and all acts, doings and returns of such deputies shall be signed by them respectively as deputy-sheriff, and shall be taken and deemed as the act of the sheriff appointing them." The sheriff is by these several clauses made responsible for the official acts of his deputy in the ordinary routine of his official duty. And the practice has been, to institute actions for and against the sheriff on account of the acts, doings, and returns of his deputy. But the statute is silent as to the official contracts of the sheriff's deputies. In such cases the action may be brought in the name of either the sheriff or his deputy, and no injury can accrue to the defendant, if the latter mode be preferred. All that he can recover is his costs, which are secured by a bond of recognisance at the issuing of the writ; and if it should be necessary for the defendant, to avail himself of any act of the high sheriff, as a dismissal from

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office, &c. this he may show in pleading to the action brought by the deputy. But we do not consider the contract upon which this declaration is predicated to come within any of those *ordinary* official acts of the deputy by which his principal can be implicated. The plaintiff, as deputy-sheriff, had a writ of execution to serve and return. He was within view of the debtor, and was about to arrest him and commit him to prison. The defendant, brother to the debtor, promises the plaintiff, that if he would forbear to arrest him for a time, he would have him forthcoming in the shire town on a certain day within the life of the execution. This was a private contract between the plaintiff and the defendant, in which the high sheriff could have no interest. So far from it, if the defendant failed in his promise, an action would lie against the sheriff, on behalf of the judgment creditor, to recover the contents of his execution, with damages and costs, for the laches of his deputy in neglecting to serve it; and the high sheriff would have an action against his deputy and his sureties, upon their bond of indemnification. But the sheriff could have no action on this contract. He was not a party to it, expressly or by implication of law. It was a contract made solely with the deputy to indemnify him for an action which might be brought against him by his principal, who, it is now said, ought to have brought the action. If this suit had been brought in the name of the high sheriff, the declaration would have been clearly demurrable; and if he had failed in the action, he could not have been remunerated for his costs under the bond of indemnification executed to him by his deputy and his sureties; for such bond only conditions against

all acts, defaults, laches, &c. by which the sheriff may be damnified, and would well cover the damages and costs which the sheriff might sustain by the neglect of the deputy in neglecting to serve the writ of execution, but would not cover the costs the sheriff might be put to by prosecuting a private contract made by his deputy; and this gives the true distinction between such acts or contracts of the deputy as may be prosecuted in his name, or must be in that of the sheriff. If the contract be in the ordinary duties of the sheriff's department, the suit should be in the name of the high sheriff, and on failure he can in all such cases have recourse to an action upon the deputy's bond for indemnification; but if the failure in an action upon the contract cannot be covered by the deputy's bond of indemnification, the action must be brought in the name of the deputy, as in the present case.

In reply to the second exception in demurrer, we contend, that this is not an illegal contract. A fair view of the nature of our writ of execution will show that the deputy-sheriff did nothing by this contract but what was in strict conformity with the humane intent and provision of the statute.

Whilst a suit is *sub lite*, it is always uncertain for which party final judgment will be rendered; and indeed suits of the greatest importance are often decided upon such nice points that the most sagacious of the profession cannot anticipate, with any degree of infallibility, a favourable issue for their clients. A final judgment therefore generally operates a surprise upon the losing party, which he is commonly unprepared to meet. The Legislature considering these things, have, by the proviso to the 95th section

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Vermont Stat. vol. 1. p. 94.

of the judiciary act, enacted, "That no execution shall issue on any judgment rendered by either the Supreme or County Courts, until *twenty-four hours* after the rising of such Courts, unless by the special permission of the Judges of such Courts." And in the body of this section it is declared, "That any writ of execution issued from either of the Courts aforesaid, shall be made returnable within sixty days, or to the next Court, (if not less than sixty days,) at the election of the party." The design of the Legislature is obvious. Twenty-four hours after the rising of the Court is allowed to the judgment debtor to discharge the judgment, to save the expense of officers' fees, and the injury to his feelings in having an execution taken out against him. If he cannot prevent this, the law allows him sixty days to satisfy the execution. But if the officer commits the debtor on the first day after issuing the writ of execution, the beneficial and humane design of the law is defeated. The sheriff will usually allow the debtor a reasonable part of this term of sixty days, to collect money to satisfy the execution, that is, if he considers the debtor as a person of integrity; for if he comes within view of the debtor, so that he might arrest him, even on the first day of the life of the execution, and should not be afterwards able to arrest him, he is responsible for the judgment debt. A case will frequently happen, where the sheriff, in the early life of the execution, sees the debtor. It is his duty to seek him early, and when he is once within his reach, the question arises, is he obliged immediately to arrest and imprison him? or he may contract with some responsible friend of the debtor, to see him forthcoming within the life of the execution,

and thus give the debtor time and opportunity to satisfy the same, and avoid imprisonment. If he takes such security, is this an illegal contract? Has the sheriff contracted not to do his official duty? Is he not walking in the spirit of his official duty? The statute allows the judgment debtor sixty days to satisfy the execution, and avoid a prison. The officer has allowed the *same time*, and for the *same* humane purpose.

If a debtor's personal property is taken by execution, or his land has been levied upon, he may in the first instance, by tender of the debt and officers' fees in the life of the execution, relieve his property, and in the latter, a time is expressly allowed him to redeem; and his property, whether personal or real, has, in the interim, served him in the nature of bail. If property can, in these instances, save a debtor from gaol, and afford him a time to collect the money due on the judgment, why should not the contract of a responsible man do the same? What injury does the creditor sustain by such contract? If the debtor who is thus bailed procures the money to satisfy the execution, which he is better enabled to do, by having a few days of liberty allowed him, than if incarcerated, the creditor has all he can desire. If the debtor's body is returned by his bailor, who promised to have him forthcoming in the life of the execution, and the sheriff commits it, has the creditor any right to complain? Has he not obtained all the satisfaction for his debt which the law contemplates by imprisonment? If the bailor does not surrender the debtor according to his contract, the creditor has an action against the high sheriff, and is secured in his debt, which he might have lost by

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the commitment of a poor debtor. Who then is injured by this action being sustained? Who is injured if the demurrer should prevail? Why those whom the laws ought peculiarly to protect; the poor and distressed part of the community. If a judgment debtor has ostensible property, the sheriff can levy upon it, or safely allow him the run of the execution. But if a debtor has no ostensible property, or none which he can immediately command, though he may be enabled to satisfy the execution by even his manual labour, within the sixty days, and although his character is such, that the most responsible man would engage to see him forthcoming within the life of the execution, if the officer would omit to arrest him immediately, yet he must be immediately imprisoned. It surely would not be correct thus to deprive the poorer portion of the community of a beneficial and humane provision of the law, especially as it must have been designed peculiarly for their benefit. We consider, therefore, that the contract declared upon, so far from being illegal, is strictly within the line of the deputy-sheriff's duty, and in pursuance of the spirit of the statute.

In reply to the demurrant's third exception, we observe, that this is an express contract, and the question is not now, whether one might not have been made more explicit, or more convenient for the parties. The defendant, we allege, promised to surrender the body of *Jacob Goold*, in *Rutland*, on the fourth *Monday* of *May*, A. D. 1801, to the plaintiff, so that it might be charged with a certain writ of execution, which the plaintiff held as deputy-sheriff. The defendant now says this contract is vague, because it does not specify any particular place in that

town at which the debtor was to have been delivered. If no particular place within the town was mentioned, the most reasonable must have been intended by the parties; but this is no sufficient exception in demurrer, nor was the plaintiff, in his action for the breach of the promise, obliged to set forth the most reasonable place. If the defendant had the body of *Jacob Goold* in *Rutland*, ready to have been delivered upon the day agreed upon, he should have pleaded it in bar, and the question might have arisen whether the place was reasonable; and this might have been brought to issue by the pleadings. But it is said that the plaintiff should have alleged that he was ready to receive the body of the debtor, or that he demanded it of the defendant.

When a promisor engages for a legal consideration to do a thing, and is sued for the non-performance, it is sufficient for him to show in defence that he has done all he promised to do, so far as he was able, without the concurrence of the plaintiff, and the plaintiff is not obliged to allege a special *tems prist*, or a special demand where the contract is to deliver at a certain day and place; these being only necessary to be alleged where the time and place are not included in, or where a special demand is made part of, the contract.

Cook declined replying to the plaintiff's counsel.

Judgment, that the declaration is sufficient.

Samuel Prentice, for the plaintiff.
John Cook, for the defendant.

Chipman v. Cook.

DARIUS CHIPMAN, Esquire,
against
JOHN COOK, Esquire.

In an action for slander, where a count contains words acknowledged to be *actionable*, coupled with others not actionable, but spoken at one time, the latter will be considered as merely in aggravation; and the finding *entire* damages by the Jury will not vitiate their verdict.

MOTION in arrest of judgment.

This was an action for words. The plaintiff declared in two counts, and had a verdict for 182 dollars and costs.

The defendant filed the following motion:

Darius Chipman v. *John Cook.*

Rutland County, Supreme Court of Judicature, May adjourned term, A. D. 1803.

Now the defendant in Court by himself, after verdict and before judgment, prays this Honourable Court that no judgment be rendered on the verdict of the Jury in said cause, because he says, that the plaintiff's declaration contained two counts; that the first count is in substance, that the defendant uttered and published, &c. the following false, scandalous, malicious and defamatory *English* words, of and concerning the plaintiff, as State Attorney, and attorney at law, on the 20th of *September*, A. D. 1801, and at divers other times between that time and the 1st day of *March*, 1802, in the presence and hearing of divers good people of this State, to wit, "The said *Darius Chipman* is not to be trusted in any business whatever, and I can prove that he took half a ton of cheese as a bribe of *Benajah Garnsey Roots*, to induce him to enter a *nolle prosequi* in favour of said *Roots*, in a prosecution in favour of the State against

said *Roots*, and that he did actually and corruptly enter a *nolle prosequi* in favour of the said *Roots*, in consequence of receiving the said half ton of cheese as a bribe; and also that *Darius Chipman* is not a man of integrity, and is not to be trusted; he will take fees on both sides of a cause, and is a worthless lying villain."

That the second count in said declaration is in substance as follows: That between the 15th day of *September*, A. D. 1801, and the 1st day of *March*, A. D. 1802, the defendant, at, &c. did speak, utter and publish the following false, scandalous, malicious and defamatory words, of and concerning the plaintiff as a counsellor and attorney at law, in the presence and hearing, &c. to wit: "*Darius Chipman* is a man not to be trusted in his business as an attorney. He will take fees on both sides, and no man is safe who puts business into his hands to perform as an attorney or otherwise; and the only advantage any man can have by employing him is, that he will swear falsely in his client's cause." That the defendant pleaded the general issue to this declaration, and gave notice to the plaintiff that he should give evidence of the truth of the words spoken in justification, and that the Jury returned their said verdict for the plaintiff, which is, "That the defendant is guilty in manner and form as plaintiff in his declaration hath alleged, and we find for the plaintiff to recover of the defendant the sum of one hundred and eighty-two dollars damages, and his costs. *Calvin Conant*, foreman."

That the plaintiff, in the cause aforesaid, did give no other evidence to the said Jury, than that the defendant did utter and publish, &c. that the defend-

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ant said, that in the State prosecution against *Benajah Garnsey Roots*, the plaintiff, as State Attorney, received of said *Roots* half a ton of cheese as a bribe to enter a *nolle prosequi* in favour of said *Roots*, and that in consequence of said bribe the plaintiff did enter said *nolle prosequi*, which he the defendant could prove, and no other evidence to prove the plaintiff's whole declaration, and that the defendant confessed no other part or parts of the plaintiff's declaration than as above stated, as given in evidence, and that said verdict is found generally on all the distinct words and counts in the plaintiff's said declaration mentioned; whereas there was no evidence given in support of the second count in the plaintiff's declaration, and the words in the second member of the said first count, to wit, " that *Darius Chipman* is not a man of integrity, and is not to be trusted; he will take fees on both sides of a cause, and is a worthless villain," are not actionable; all which the defendant will verify as the Court shall order. Wherefore the defendant prays that no judgment be rendered on said verdict, but that the same be set aside.

John Cook, for himself.

Cook, pro se. In support of my motion, I contend, that where there are several counts for words in the same declaration, and no evidence is adduced in support of but one count, and the Jury find generally for the plaintiff, the verdict is bad.

Secondly. That where one count sets forth several sets of words, and there is no evidence of the uttering and publishing but one set of the words, and the Jury find for the plaintiff generally on such count, the verdict must be set aside.

Curia. On the trial there was no evidence of the defendant's having uttered and published the words set forth in the second count, and the Judge in the charge to the Jury, directed them to lay the second count out of their consideration. The damages assessed afford a strong presumption that they did so. "After verdict, the Court will suppose every thing right, unless the contrary appears on record;" 1 *Wils.* 255. especially where it appears substantial justice has been done.

Cook. I shall rely, then, on my second position.

Curia. It appears from our minutes, that the defendant, on the trial, confessed the speaking of all the defamatory words set forth in the first count; so that the only question, if any, must be, whether the latter words in the first count are actionable, and if not actionable, whether they will vitiate the verdict found on the *entire* count?

Cook. I shall show that these words are not actionable, and that the verdict is bad, which found entire damages for these words, coupled with others which were actionable.

The words contain two assertions respecting the plaintiff.

First. "That he is not a man of integrity, and is not to be trusted. He will take fees on both sides of a cause."

Secondly. "He is a lying worthless villain."

As to the first. It is laid down in *Comyns' Digest*, vol. 1. p. 266. "That words are not actionable, if

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they do not import a specific charge of some offence."

The words, it will be observed, are not laid with a *per quod.* The distinction between words which must be thus laid, and those where no special damage is necessary to be alleged, seems to be, that where the defamatory words expose a man to criminal prosecution and punishment, there they may be laid in the declaration without any especial damage; but where they do not expose a man to any criminal prosecution, a *per quod specialiter dam.* must be set forth. The words found by the Jury did not expose the plaintiff to the penalties of the law, and should have been laid with a *per quod.* As they are laid they are not actionable, for they do not state any specific charge, which might be the ground of a public prosecution. *Hence* the maxim I have read from Chief Baron *Comyns*, which is strongly enforced in the books by many cases in point, as in *Cro. Jac.* p. 202. *Smith* v. *Turner*, action upon the case for these words, "*Thou art no true subject to the king, and that I will prove;*" the defendant pleaded not guilty, and found against him. It was moved in arrest of judgment, that these words were not actionable because they be too general, and after divers motions resolved by the Court that the action lies not.

So to say of a man, "*Thou hast committed a burglary in breaking his house,*" without mentioning the house of any one. 1 *Roll.* 71. l. 30. So in the case of *Powell* v. *Hutchins*, *Cro. Jac.* 204, action for these words, "*Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows,*" it was held the action lay not.

So to say of a counsellor at law, "*He has no more wit than a jackanapes*," is not actionable. *Godb.* 441. or that "*he hath nothing but what he got by swearing and forswearing*," *Co. Ent.* 21, 22. So in the case of *Thomas Rich* v. *Holt*, as reported in *Cro. Jac.* p. 267. it was decided, that no action lay for saying of a counsellor, "*You are a paltry lawyer, and used to play on both hands.*" All these decisions are upon the same principle, that the words convey no specific charge, which might be the ground of a public prosecution.

The latter words, "*He is a lying worthless villain*," are not surely actionable; for no words, however opprobrious, unless laid with a special *per quod*, are actionable, if they do not immediately affect a man in his profession, occupation, or trade. The case of *Cotes* v. *Ketle*, *Cro. Jac.* p. 204. is fully in point. Error of a judgment in *Bury*. Action for these words: Whereas the plaintiff was a cooper, and had used that trade twenty-four years, and thereby had gained his living, the defendant said of the plaintiff, "*He is a very varlet and a knave;*" and upon this the plaintiff had judgment there, and error assigned was, that the words were not actionable, and for this cause reversed.

So, in the case of *Todd* v. *Hastings*, reported in 3 *Sanders's Reports*, p. 307.

But the opinion of Chief Justice *Vaughan*, in the case of *King, of Gray's Inn*, v. *Sir Edward Lake*, ported 2 *Ventris*, p. 28. puts this doctrine in a very clear light; and although the learned Judge's opinion did not prevail in that particular action, yet it has since been supported by the whole current of authorities; and if this action had not been laid with

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a *per quod*, undoubtedly his learned brethren would have concurred with him in opinion. The plaintiff alleged, that he was bred up to the law, and practised it, and had many persons of honour and others his clients, and thereby got money and maintained his family, &c. The defendant *falso et maliciose* wrote a letter to *Anne*, Countess of *Lincoln*, who was the plaintiff's client, containing, that the plaintiff would give vexatious and ill counsel, and stir up a suit, and that he would milk her purse, and fill his own large pockets, &c. *per quod* he lost the said Countess and other clients; upon not guilty pleaded, and a verdict for the plaintiff, it being moved in arrest of judgment, *Wylde*, *Archer*, and *Tyrrel* held that the action lay: it is a scandalous letter concerning his profession, and here is a special damage. *Vaughan*, Chief Justice, "I must submit to the rule given, but I am of another opinion. In ancient books we do not read of an action for words, unless the slander concerned life. It was held not actionable to call "*villain*," unless it were added he was laid in wait to be seized. The growth of these actions will spoil all communications. A man shall not say such an inn or such wine is not good. Their progress extends to all professions. To say a man is not a good surveyor, has been held actionable. The words spoken here have no more relation to the plaintiff's profession, than to say of a lawyer that he hath a red nose, or but a little head. To say one had used a woman's body is slander, it being an idiom of speech for lying with her. But it is objected, that all these words taken together make a slander. No man can assign me such a ratiocination *à male divisis ad bene conjuncta.* I never heard it but in my Lord

Strafford's case, viz. that many trespasses should make a treason. It is said he stirred up a vexatious action. So does a counsel when he advises an unsuccessful action, for the party is amerced *pro falso clamore.* "He will milk your purse," taken enunciatively, signifies no more than milking a bull. The phrase is not come to an idiom. So of filling his pockets; these words may have been spoken of the law; and indeed they are spoken of the thing, not the man or his practice. Dunce, corrupt, &c. concern the profession. But these words are applicable to any. If he had said, he is not a good fidler, would that have been actionable?"

The words then being shown not to be actionable, it remains to show, that being combined in the same count with those which are actionable, a verdict finding damages upon the entire count is bad.

It is a settled rule, that where there are several counts, and verdict is entered generally on all the counts, and entire damages are given, and one count is bad, it is fatal, and judgment shall be arrested; *Douglas's Reports*, 730. *Grant* v. *Astle*, 3d edition, and it shall be awarded *in toto*, and no *venire de novo* be awarded. 696. *Trevor* against *Wall*, 11 *Term Rep.* 151. *Hancock* v. *Haywood*, 3 *Term Rep.* 435. *Holt* v. *Scholfield*, 6 *Term Rep.* p. 691.

So, in the case of *Onslow, Esquire*, v. *Horn, Clerk*, the judgment was arrested, because the words in the latter count were not actionable. 3 *Wils.* 177. So in the case of *Savile* v. *Jardine*, 2 *H. Black. Rep.* p. 531. The reason of these decisions applies equally to the case where part of the words in one count are not actionable, upon the general principle laid down in the case of *Hambleton* v. *Vere*, 2 *Sanders*, 169. as

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cited in *Comyns' Digest*, vol. 5. tit. *Pleader*, (S. 25.) a verdict shall be void if it give damages for that for which no cause of action was then incurred.

Smith arose to reply, but was interrupted by the Court.

Opinion of the Court.

Curia. The case is *luce clarius*, and the principles upon which it must be decided too well settled to require any reply on the part of the plaintiff necessary.

The motion in arrest of judgment is grounded on two exceptions to the verdict:

First. That a certain section of the defamatory words set forth in the first count in the plaintiff's declaration, are not actionable.

Secondly. If not actionable, the Jury having found entire damages on this count, the verdict is vitious.

As to the first exception, the Court are clearly of opinion, that the words are actionable. The doctrine of the law is perspicuous. A man is entitled to recover damages for words maliciously spoken, first, when the words contain an express imputation of crime liable to punishment, some capital offence or other infamous crime or misdemeanor; secondly, when the words are spoken of one in an office of profit or credit, and when the words are obviously to injure the person in office; in both cases no especial damage is necessary to be alleged. The plaintiff in this case sets himself up as a governmental officer, and as an attorney of this Court. It is unnecessary to repeat

the words found by the Jury to have been spoken by the defendant. It is obvious that they tended, in a very aggravating degree, to expose the plaintiff, as a public officer, to impeachment, and to injure him in his office of an attorney of this Court.

The decision of this question might seem to render the consideration of the second exception unnecessary. But as the Court consider it beneficial for the junior practitioners at the bar to deliver their opinion on all proper occasions, we add, that if the words in the latter sections of the first count had not been actionable, yet the verdict of the Jury would not have been vitious. It is true, that if the plaintiff have several counts in his declaration, and the words in the first count are actionable, and he sets forth in the second count other words spoken at another time, which are not actionable, and the Jurors assess damages entirely, judgment will be arrested for the whole. But here it appears the words were spoken at one time, and therefore properly included in the same count; and it is considered to be undoubted law, that where a count contains words acknowledged to be actionable, coupled with others not actionable, but spoken at one time, the latter shall be considered as merely in aggravation, and the finding entire damages on the whole count will be good.

Judgment that the defendant take nothing by his motion, but that the same be dismissed with costs.

Israel Smith, for the plaintiff.
John Cook, *pro se*.

Parker v. Bixby and Osgood.

JONATHAN PARKER, Junior,
against
BIXBY and OSGOOD.

EJECTMENT for lands in *Brandon*.

General issue pleaded, and put to the Jury.

In support of his title, the plaintiff offered a deed from *Abraham Ives*, sheriff, and *ex officio* collector of State taxes in unorganized towns, conveying the lands in question to the plaintiff's ancestor for neglect of payment of a State tax, granted *October* 21, 1783, the deed dated *November* 1, 1784, conveying the whole rights of *William Shattuck* and two others.

An objection was taken to the reading of the deed, and reliance was had on the 3d section of the additional act, passed *March* 9th, 1784. "And whereas it may be more convenient to sell so much of each delinquent proprietor's right or share as will pay the proportion of such delinquent's tax and attending charges: Therefore, be it enacted by the authority aforesaid, that those persons who are by law appointed collectors of the land-tax, granted by this assembly in *October* last, where they can ascertain the names of the original proprietors in any town subject to said tax, be, and they are hereby directed to sell so much of each original right on which the said tax shall not be paid, *beginning with the undivided*, if any there be, as will raise a sum of money sufficient to pay said tax on such right and attending charges, passed the 9th day of *March*, 1784.

Vermont Stat. vol. 2. p. 231.

When the sheriff, as collector of taxes in an unorganized township, sets forth in his deed, "that he hath in all things proceeded according to law," it will always be received as *prima facie* evidence that he hath proceeded legally in all matters relating to the sale of land for the non-payment of taxes, where a special record is not made necessary by statute.

It was urged by the defendants' counsel, that the sheriff, as collector, had no power to vend *whole*

rights of land, until he had first sold the undivided land, if any there were, and that the deed should have shown that there were no undivided lands in the township of *Brandon*, and therefore that the sheriff had proceeded to vend the whole rights.

Sed per Curiam. The sheriff sets forth in his deed, that he hath in all things proceeded according to law, and this has always been received as *prima facie* evidence that he had proceeded legally in all matters relating to the sale of lands for non-payment of taxes, where a special record is not made necessary by statute. The Court consider, that former decisions on this point will include the present question, and that the *onus probandi* lies on the defendants to show that the sheriff proceeded illegally to vend these whole rights.

Let the deed be read to the Jury.

Daniel Chipman and *Darius Chipman*, for the plaintiff.

——— ———, for defendants.

ELISHA CLERK, Judge of Probate,
against
WHITFIELD FOSTER and others.

The Supreme Court will reverse an order made by them, when it is discovered and decided to be against an existing statute.

ORDER of the Supreme Court of Judicature reversed.

The plaintiff brought an action against the defendants as obligors in an administration bond, executed to him in his official capacity, dated 21st of

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October, 1788, conditioned that *Whitfield Foster* and *Jonathan Parker*, junior, administrators on the estate of *Solomon Johns*, deceased, should exhibit an inventory of the intestate's estate, &c. in the usual form. This action was entered at the *Rutland* County Court on the third *Tuesday* of *November*, 1797, came by appeal to the Supreme Court, and at the *May* adjourned term, 1800, the defendants, on motion, obtained an order of the Court that the name of the person on whose application the suit was brought, should enter as prosecutor. At the *February* term, A. D. 1802, the plaintiff filed the following motion, which was argued and reserved for consideration, and judgment delivered this term.

State of Vermont.

Supreme Court of Judicature, *Rutland* County, *February* term, A. D. 1802.

Elisha Clerk, Judge of Probate,
v.
Whitfield Foster and others.

And now the said *Elisha Clerk* moves and prays the Court here, that a certain rule and order of said Court, heretofore made in the case aforesaid, may be reversed and annulled, which said order is as following, to wit:

Supreme Court of Judicature, *Rutland* County, *May* adjourned term, A. D. 1800.

Present in Court,

Honourable *Enoch Woodbridge*, Chief Judge.
Noah Smith, Assistant Judge.

Elisha Clerk, Judge of Probate,
v.
Whitfield Foster and others.

Clerk
v.
Foster et al.

It is ordered by the Court, that the person on whose application this suit was instituted in the name of the said *Elisha Clerk*, enter as prosecutor, agreeably to the statute in such case made and provided, and that the said prosecutor assign the breach or breaches of the condition of said bond, agreeably to the said statute, and that the pleadings be closed accordingly, before said cause proceed to trial.

Per order,

Nathan Osgood, Clerk.

And of this the said *Elisha* prays judgment, because, he says, that the bond aforesaid, on which the action aforesaid was commenced, became by law forfeited to him in his capacity of Judge of Probate as aforesaid, before the enacting of the statute aforesaid, and for that the action aforesaid, and pleadings in the same, were commenced, made, and had before the passing and enacting of the said statute; for that by said order said statute is made to have an *ex post facto* effect upon the action aforesaid, and for that the said order is illegal, and against the rights of a party vested before the making thereof, and tends unlawfully to call in and make other parties to the suit, and to vest them with the rights of the plaintiff, all which the said *Elisha Foster*, Judge of Probate as aforesaid, is ready to verify, when and where he ought, &c. Wherefore he prays, &c.

By

Cephas Smith, junior,
Chauncey Langdon,
Samuel Walker, his attorneys.

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At *Bennington* term and County, *February*, A. D. 1802, in the cause of *Nathaniel Brush, Esquire, Judge of Probate*, v. *Joseph House et al.* vid. *ante*, this volume, p. 87. it was decided, " that in an action in the name of the Judge of Probate, upon an administration bond, where the bond is dated and the writ tested anterior to the passing of the present act for the probate of wills, &c. the Judge of Probate cannot be compelled to certify the name of the person applying to him to prosecute under the 103d section of that act; and this decision having settled the main question in this case, the Court directed that the order of the Court, of *May* adjourned term, A. D. 1802, should be reversed.

The plaintiff then assigned certain breaches of the condition of the bond, and issue joined to the Court, who found for the plaintiff, with one cent damages and costs.

Cephas Smith, junior, *Chauncey Langdon*, and *Samuel Walker*, for the plaintiff.

Daniel Chipman and *Darius Chipman*, for defendants.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

BENNINGTON COUNTY,
MANCHESTER FEBRUARY TERM, A. D. 1803.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

STATE *against* ELIAS KITTLE, BENJAMIN SHERMAN, ASAPH LARRABEE, WANTON AYLSWORTH, and ARNOLD ALFORD.

THE defendants were indicted before the County Court. The indictment contained *four* counts: the three first for a riot, the fourth for a common assault and battery. They went to trial in the lower Court, and the Jury found them guilty only on the *fourth*

When an indictment, which contains sundry counts, has been presented at the *County Court*, against several defendants, and they are acquitted on all the counts save one, and *appeal*, although on arraignment they plead *generally* not guilty, the Court will not compel them to go to trial on those counts on which they had been acquitted at the lower Court.

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count. They appealed to this Court, and now a question is made, whether the defendants, who had been arraigned and pleaded not guilty to the indictment, were held to defend on the three first counts in the indictment.

It is insisted for the State, that the *appeal* set the whole judgment afloat, and the defendants must be tried as if the indictment had been presented to this Court; that no injury can accrue to the defendants from a trial upon all the counts; for if they are innocent of the charges in the three first counts in the indictment, a trial upon them cannot injure.

For the defendants it was contended, that where a charge is single in an indictment, and indeed in every case where the accused is acquitted in the County Court, it has never been understood that the government had a right of appeal. In such cases it has been the uniform practice, since the existence of the government, for the defendant to go without day from the County Court. That it would be a strange perversion of this practice to oblige the defendants, who have been acquitted of the main charges of an indictment contained in several counts, if they chanced to be convicted of a trifling breach of the law counted upon in the same indictment in the lower Court, to be subjected, on appeal, to another trial upon those counts upon which they had been acquitted. It is said, if they are innocent no injury can happen to them. We consider it a serious injury. It certainly is a heavy expense, to be constrained to bring a great number of witnesses on the stand, many of them from a great distance to prove

our innocence. It certainly will operate a surprise upon the defendants, who, relying on known and established practice, have omitted to summon their witnesses as applicable to the three first counts in this indictment. State v. Kittle et al.

Curia. Let the respondents go to trial on the fourth count of the indictment only. The Court were not availed of their acquittal in the lower Court of the three first counts in the indictment, or they would have directed the clerk to arraign the defendants on the fourth count only. The clerk will rectify the entry.

Richard Skinner, State Attorney.
Nathaniel Chipman and *Daniel Chipman*, for defendants.

MEMORANDUM.

Baldwin's Case.

AT this term the Grand Jury came into Court, and stated by their foreman, that a complaint had been exhibited to them, charging *Silas Baldwin*, one of their fellows, with an offence. That they considered it improper to proceed in the examination of witnesses in the presence of the person accused. That they had desired him to retire, but that he had declined, and requested the Court to order him to retire during this particular investigation. The Court have no power to order a Grand Juror to withdraw himself from the panel in any *particular* case.

Baldwin's Case.

Curia. The Court consider that a Juror, circumstanced as *Silas Baldwin* is, would willingly withdraw himself during an investigation in which he is so deeply interested. But the Court do not consider themselves as having power to order a Grand Juror to withdraw himself from the panel in any particular case. The statute provides, that there shall be eighteen Grand Jurors summoned; and if they do not all appear, it is the constant practice of the Court to fill the panel by *tales*, while twelve of them can find a bill of indictment. This surplusage is designed to guard against the injury to public justice which might arise if it were necessary that the whole panel should unite in a presentment, as a Petit Jury must in a verdict. In such case the self-interested or the near relative might prevent an indictment. In the present case no serious injury can arise to the government from the personal presence of the accused. The Jury will proceed in their duty, and it will be their concern to see that the Juror's conduct, which is certainly calculated to impress an unfavourable opinion of him, does not enter into their decision upon his case.

The Grand Jury presented a bill of indictment against *Silas Baldwin*, and the next term he was convicted by verdict of the Petit Jury.

AN

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TO

THE PRINCIPAL MATTERS.

A

Abatement.

When a person, not a freeholder, or being a freeholder, not resident within this state, applies to any person having authority to issue writs for any process whatever, to attach any person or persons to answer before any court in this state, and offers surety for the prosecution of his writ to effect, the sufficiency of such surety must be determined solely by the person issuing such writ, and cannot be afterwards questioned under a plea of abatement. *Chipman* v. *Pearl*, 267

The court will not abate a writ of summons, directed to, and served by a deputized person, if the authority signing it, omits to mention, *particularly*, all such known officers as might legally serve it, "*if seasonably to be had.*" *Bell* v. *Chipman*, 423

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The court are not held, judicially and *ex officio*, to notice a private act of the General Assembly; he that would take the benefit of it, must attach it to the record. *Pearl* v. *Allen*, 311

Accessary.

A person may be held to answer an information for receiving stolen goods, knowing them to have been stolen, *contra formam statuti*, though the principal has not been convicted. *State* v. *S. L.* 249

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An action will lie for the advancing money to a bankrupt, with intent and to enable him to obtain on a credit, merchandise which goes into the possession of the lender, although the plaintiff never had any view or knowledge of the defendant. *Windover and Hopkins* v. *Robbins*, 1

In an action brought to recover treble damages, upon the first section of the act, more effectually to prevent trespasses, in divers cases, it is necessary for the magistrate, issuing the original process, to make a minute on the writ, under his official signature, of the day, month and year of his signing the same. *Bowen* v. *Fuller*, 85

An action, on the case for a libel, will lie against two or more, if it be a joint act done by all. *Harris* v. *Huntington, jun. et al.* 129

An action, for fraud in the sale of land, may be supported by parol testimony, and it is not necessary that the fraud should

be apparent on the deed. *Sandford* v. *Rose and another*, 428

An action will well lie in the name of a deputy-sheriff on a promise, made to him, by a third person, to surrender the body of a debtor within the life of an execution. *Miller* v. *Goold*, 439

If an injury is sustained, in consequence of the mal-administration of a justice of the peace, an action will well lie against him. *State* v. *Campbell*, 182

See Libel.

Administrator.

When a party, against whom an action is brought, dies before the *essoin* day, the plaintiff cannot, by docketing his action on the return of a *scire facias*, compel the administrator to appear and defend the suit, under the seventy-third section of the judiciary act, even if the right of action survives. *Hyde* v. *Leavitt, Administrator of Griffin*, 170

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When two or more are made defendants, under the processes provided in the act against forcible entry and detainer, and all are found guilty, and one appeals, it will be considered by the court, that he appeals for the others. *Hurlbutt* v. *J. & I. Meachum and Crammer*, 397

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A submission to five arbitrators, by name, the award to be made in writing by a majority of them. The award is insufficient, though it be signed by a majority of the arbitrators, if it does not set forth that the minority were present, or, at least, that they were notified of the time and place of the meeting of the arbitrators. *Blin* v. *Administrators of Trimble*, 304

B

Bar.

If a plaintiff declare upon a promissory note, and the defendant files a declaration on book account, under the ninety-third section of the judiciary act, it is no sufficient bar to such declaration that the items in such book account were received by the plaintiff, in pursuance of an agreement, by which the amount of them was to be allowed on the promissory note, as the statute object in filing the declaration on book account, is merely to liquidate the account, that the judgment recovered under it may be pleaded in set-off to the plaintiff's demand upon the promissory note. *Blackmore* v. *Page*, 110

The certificate of a judge of the county court, and justice of the peace, prescribed in the act relating to gaols and gaolers, and directed to the sheriff, as keeper in chief of the gaol, is a sufficient bar to an action brought against him for the escape of a prisoner liberated in pursuance of such certificate; and, if the prisoner was admitted to the liberties upon bail-bond, the certificate delivered by the judge and justice to the prisoner, may be pleaded in bar to an action upon the bond, without setting forth circumstantially the *mesne process*. *Childs* v. *Morse and Osgood*, 221

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Book Account.

When a plaintiff in an action upon book account, demands a certain sum in his declaration, which is found to be due to him, the court may, in rendering judgment, add the interest accruing from the time the account became due, until it is liquidated by the judgment. *Dickenson* v. *Gould*, 32

The act, entitled an act, relating to actions of accounts, passed 23d *February*, 1797, only controls actions of book accounts, originally commenced before the county court. *Id.* 43

When an action of book account, originally before a justice of the peace, comes by appeal to the county court, and defendant is defaulted, the court are not restricted to appoint an auditor or auditors, as they would be if the action had been originally brought before them, but may, in their discretion, audit the plaintiff's account themselves, or by another, or others, under the 54th section of the judiciary act. *Id.* 32

See Bar.

C

Certificate.

The certificate of a judge of the county court and justice of the peace, prescribed in the act, entitled an act, relative to gaols and gaolers, and for the relief of persons imprisoned therein; passed *March* 9th, 1797, delivered to a prisoner admitted to the liberties of the prison, is a sufficient bar to an action brought by the sheriff or his assignee upon the bail-bond, and escape assigned as a breach, without setting forth, other than substantially and as inducement, the *mesne process*; that all exceptions to such process must be taken before the court holden by the judge and justice; that the supreme and county courts cannot judge over the court of gaol delivery, as it is vulgarly called, where the process is merely *voidable*, but only where it is void *ab initio*. *Brush, Assignee of the Sheriff*, v. *Robinson and another*, 358

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It is a good cause of challenge to a petit juror, that he has been recognised for costs of prosecution in the suit, although he has been discharged from his recognisance. *Phelps* v. *Hall*, 401

And although such juror may have remained on the panel, by consent of parties, yet this shall not conclude the party from challenging him for this cause, upon the empannelling another jury to try the same issue. *Id.* *Ibid.*

Commission.

The *United States* Collector, of a port in this state, is not obliged to exhibit his commission in court, to justify his seizing property in violation of the revenue laws, but his deputy must show his commission in such case. *Jacques* v. *Griswold*, 235

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The signature of a party to a release cannot be proved by comparison of hand-writings, if there be a subscribing witness, even though the witness resides without the state, for if the place of his residence be known, and he lives within a reasonable distance from the place of trial, his deposition should be taken. *Rich & Rich* v. *Trimble*, 349

Confession.

The confession of a person on trial, must be submitted to, and weighed by the jury; if extorted by personal suffering, applied to the prisoner with a direct design, it ought not to weigh in the least; if produced by fear or flattery, the jury must determine whether it be true or not; but, if supported by corroborating testimony or circumstances, it cannot operate to convict. *State* v. *Cato Jenkins*. 377

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Costs.

The plaintiff in an action of defamation, who, on appeal, recovers under seven dollars, can tax no more costs than damages. *Smith* v. *Shumway*, 75

In an action for defamatory words, if the plaintiff in the county court recover under seven dollars damages, and, on appeal, recover above seven dollars damages, he shall tax full costs in both courts. *Dwinells* v. *Aikin*, 78

When in an action for slanderous words, a verdict is found, and judgment rendered in the county court for the plaintiff, for a sum which does not surmount seven dollars, on a review or appeal entered, the county court should not tax the costs until the ratio of the taxation be found, which cannot be known until the final verdict and judgment. *Id.* 79

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Declaration.

A correct declaration in debt, on judgment, always alleges that the judgment is not satisfied. This is so essential, that if omitted, the declaration would be ruled insufficient on demurrer. *Dewey* v. *Bradbury and Shallis*, 207

Upon an appeal from the report of commissioners on an insolvent estate, the court will allow a declaration to be filed, on payment of costs, provided the nature of the plaintiff's claim can be understood, by the certified copies, from the registry of probate. *Francis* v. *Administrators of Lathrope*. 372

In an action upon a recognisance, taken for the prosecution of a writ of replevin, where the redelivery of the property has been awarded, it is not necessary to allege in the declaration a special demand of the property replevied. *Cushenden and Rutherford* v. *Harman, Board and Reynolds*, 438

In an action of trespass *vi et armis*, for an injury done to personal property, if the plaintiff describe the *locus in quo as a close* in his declaration, and alleges a breaking and entering and doing damage, if he does not set forth a seisin or possession of the close in any one, this shall be considered as mere surplusage, and the declaration will, on demurrer, be held good, if without this it contains sufficient to sustain an action of trespass *vi et armis*, for a chattel injury. *Hawley* v. *Clerk and Hazletine*, 20

Debt.

When a creditor has taken out a writ of execution, upon a judgment, against two, one of whom has been committed upon it to prison, admitted to the liberties, and escaped, and the bail-bond has been assigned to the sheriff and received by the creditor, he cannot maintain debt, on judgment, against both. *Dewey* v. *Bradbury and Shallis*, 201

Regularly, debt cannot be maintained on a judgment, unless a return of the writ of execution is shown, by which it shall appear that the execution has not been satisfied in whole, or in part; or it is made evident by the record, that no such writ ever issued. *Id.* 207

In debt, on a recognisance entered into for the prosecution of a writ of replevin, if

the defendants would avail themselves of the return of any part of the property replevied, so that the identity, quantity, and quality of the property replevied becomes necessary to be spread on the record, or to use the same for any other in pleading, they should crave oyer of the record, in the action of replevin. *Cushenden and Rutherford* v. *Harman, Board and Reynolds.* 431

Distribution of Personal Estate.

If a person die intestate, unmarried and without issue, and leave surviving brethren and sisters, his or her personal estate must be distributed by the administrator, under a decree of the probate, so that the brothers shall have equal portions, and the sisters equal portions, but that each male portion shall be double the amount of each female portion. *Auger, in the right of his wife,* v. *The Administrators of Taylor,* 260

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E

Error.

The court will not sustain a writ of error, *coram nobis,* where the error assigned is an error in law, and the same point has been decided in the same case, on motion, in arrest of judgment. *Priest and others* v. *Hamilton,* 45

There is no process in the state to compel the privies in a judgment, to join in a writ of error. *Id.* 48

If an infant is coupled in a judgment with others of full age, and error is brought by all, and the error assigned be, that it does not appear on the record that the infant defended the suit by guardian, and the defendant in error alleges in his plea, that the natural guardian actually appeared and employed counsel to defend the suit for the infant, on demurrer such appearance shall be held sufficient, and the original judgment will not for that cause be reversed. *Id.* 59

A writ of error will lie upon a justice's judgment rendered in a criminal prosecution. *Brackett* v. *The State,* 169

The court will not allow a review upon a judgment in error, although formerly practised. *Enos* v. *Boardman,* 271

Where there is a defect in pleading which the party does not take advantage of by demurrer, but elects to traverse the whole, or any part of the plea, and an issue is joined, and judgment rendered on the issue, the party waiving the demurrer, can never assign such defects in error. *Brydia* v. *Platt,* 370

Escape.

A former sheriff is not answerable for the escape of a prisoner during the shrievalty of his successor, though such prisoner was committed on *mesne process,* during his own continuance in office, provided he has regularly delivered over such prisoner to his successor. *Day* v. *Sweetser,* 286

Whenever a prisoner for debt, is admitted to the liberties of the prison, and a bond, with surety, taken to indemnify the sheriff, the least *inducement,* or even *countenance* given by the creditor, to the departure of the prisoner from the liberties, is a good bar to an action on the bond when the escape is assigned in breach. *Hobbs, Assignee of Bell, Sheriff,* v. *Whitney and Parker, jun.* 409

A sheriff as keeper of the prison, to which is committed a debtor from another county, is not liable for the negligent escape of such debtor. *Chipman* v. *Sawyer, Sheriff,* 61

To an action for an escape, brought by the sheriff's assignee, upon a bail-bond, executed to the sheriff, as chief keeper of the gaol, by a prisoner committed upon *mesne process,* under the 10th section of the "act, relating to gaols and gaolers;" it is no sufficient bar, after an escape, to set forth that the prisoner remained within the sheriff's bailiwick, and was amenable to the writ of execution, which issued upon the original judgment. *Warner* v. *Evans and Gardner,* 121

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release, or receipt be fraudulently obtained or not, an estoppel cannot be urged to the exclusion of testimony showing the fraud, as the court will not notice an estoppel, unless relied upon in the pleadings. *Sawyer, Sheriff*, v. *Hoyt and Hathaway*, 288

In case, on the statute to recover the *mesne* profits of land levied upon by execution, the defendant is not estopped from showing that he had no title to, or interest in, the land. *Bowne et al.* v. *J. A. Graham*, 418

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Ejectment.

The nominal plaintiff in ejectment cannot maintain an action against a sheriff for an escape of a defendant committed, in his name, for the damages and costs, recovered in the action of ejectment. *Chipman* v. *Sawyer, Sheriff*, 61

A plaintiff in ejectment, brought, under the eighty-eighth section of the judiciary act, is not obliged to join a landlord, with the tenant, in possession, who holds by parol lease, or by written lease, unrecorded, unless it can be proved that the plaintiff had knowledge of the existence of such lease. *Wallace* v. *Farnsworth*, 294

Evidence.

In an action of deceit in the nature of a conspiracy, the acts or speeches of an alleged *particeps* in the fraud, cannot be admitted in evidence to the jury until a privity between him and the defendant, is first shown, to the satisfaction of the court; but, when proved, the most liberal latitude will be allowed in showing the conduct and expressions of the *particeps*. *Windover and Hopkins* v. *Robbins*, 14

Seisin of the land, or a mere naked claim to the crops standing and growing on the *terra in qua* the assault was committed, cannot be given in evidence under the general issue in mitigation of damages in an action of assault and battery. *Wright* v. *David, Stephanus, and Josiah Page*, 80

In an action against an administrator upon an estate, represented insolvent, declaration upon a promissory note made by intestate, the court will not admit parol testimony to show that the note had been exhibited to the commissio a claim against the insolvent *Franklin, Robinson & Co.* v. *Bra Administrator*,

In an action upon a promissary note, t fendant, under a plea of *non assu* may show that the consideration note was a quit-claim deed, exe by the plaintiff to him, for the co ance of certain lands, which the tiff induced him to purchase, by fr lently pretending that he had a ti them. *Hawley* v. *Beeman, jun.*

The deposition of a former town clerk be admitted, to show his *general* of transacting his official busi *Taylor* v. *Holcomb*,

It is not necessary that there should note or memorandum in writing contract to cut down and clear trees on the plaintiff's farm; for fourth section of the act, "regul the conveyances of real estate, an the prevention of frauds therein confined to the transfer of real es and the words in this section, " *interest therein, or concerning them,*" not extend the statute to contracts specting labour upon lands. *Fort Hamilton*,

A. mortgages lands to B. who brings a in chancery to foreclose the equit redemption against him, and, by a terlocutory decree, E. and F. who not privies to the mortgage, (but cl title to parts of the lands, by deed, ancient adverse possession,) are m parties to the bill, and B. obtains a cree, foreclosing the equity of rede tion, by a day certain *nisi*. If B. af the expiration of the term allowed redemption, brings ejectment agai the three, and A. is defaulted, B. c not show the decree in chancery *evidence*, to estop the other two defe ants from impeaching his title to t lands, or showing a better title to t whole, or any part of it, in themselv *Bowne* v. *Page, Larkin, and Osgood*, 3

In an action of trespass *quare clausum fre* against *two*, the regular levy of a w of execution upon the land, on a jud ment rendered against one of the d fendants, who had quitted possessi before, and never intermeddled wi the possession since the levy, cann be given in evidence against the oth who was in adverse possession at t date of the levy, and has not surrende ed his possession since. *Bowne et a* v. *Graham and Graham*, 41

When a sheriff, as collector of state taxes in an unorganized township, sets forth in his deed, that "he hath, in all things, proceeded according to law," it will always be received as *prima facie* evidence, that he has proceeded legally in all matters relating to the sale of land for non-payment of taxes, where a special record is not made necessary by statute. *Parker, jun.* v. *Bixby and Osgood*, 466

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Execution.

In all civil cases, where there has been a commitment on *mesne process*, the creditor must be prepared to charge the debtor, in execution, within fifteen days next after rendering final judgment against him, or he will lose his lien on the sheriff, as keeper in chief of the gaol, whether the debtor be *de facto* a prisoner at the time of rendering final judgment or not. *Day* v. *Sweetser*. 282

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G

Grand Juror.

The court have no power to order a grand juror to withdraw himself from the panel, in any particular case. *Baldwin's case*, 473

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Grand Jurors, Town.

Before the act defining the duties of grand jurors, passed 27th *October*, 1801, a town grand juror could not prefer a complaint, under his official oath, for the breach of any general law, excepting the sabbath act, or for the apprehension of the persons and tools of counterfeiters. *Brackett* v. *The State*, 152

H

Habeas Corpus.

A return, by the sheriff, of *languidus*, upon a writ of *habeas corpus ad prosequendum*, will be accepted by the court, but should be accompanied with the affidavits of visiting physicians. *Ex parte Bryant*, 269

I

Imparlance.

It is good cause for continuance, on the part of the plaintiff, under a rule to pay costs, that he has taken a deposition in another state, the caption of which proves defective, if the subject matter of the deposition is not primarily necessary to maintain his declaration, but has been rendered necessary to rebut testimony adduced by the defendant, and it has been exhibited to the defendant's counsel, who have refused to waive exceptions to the caption. *Harrington* v. *Kingsbury*, 426

Infant.

The court never appoint a guardian to prosecute for, but only to defend an infant party. *Priest and others* v. *Hamilton*, 49

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It is not necessary to insert the words, *vi et armis*, where they may be fairly implied from other words, in a complaint, information, or indictment. *Brackett* v. *The State*, 166

The advising one, against whom the sheriff has a precept, and is about to arrest; "to draw a line on the ground," and to forbid the officers to pass it, and asserting that if the officer passes the line, and the person killed him, he would be justified, will maintain an indictment against the adviser, for impeding a civil officer in the execution of his office. *State* v. *Aaron Caldwell*, 212

When an assault and battery has been made upon two, in the same affray, and both are wounded by the same stroke, and the offender has been legally convicted before a court of competent jurisdiction, for the breach of the peace, in the assault and battery upon the one, an indictment cannot afterwards be sustained against him, for an assault and battery upon the other. *State* v. *Joseph Dawson*, 387

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An indictment cannot be maintained against a justice of the peace for mal-administration. *State* v. *Campbell*, 177

The practice of renewing writs of execution by endorsement, by justices of the peace, is not well founded. A justice of the peace, in all cases where the life of the execution expires, and the date of the judgment will allow a new writ, should be careful that the original execution is returned into his office with a suitable return thereon, made by a proper officer, which return will contain a regular *non est*, or that by direction of the plaintiff, he has omitted to make service, or as the case may be or if it expired in the hands of the party a minute, indicative of the fact, should be made on the writ, and noted on the justice's record, and on the original execution being thus returned, he should issue an *alias*, or *pluries* execution, as the case may require. *State* v. *Campbell*, 181

If an injury is sustained in consequence of the mal-administration of a justice of the peace, an action will well lie against him. *State* v. *Campbell*, 182

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When jurisdiction is expressly taken from the court by statute, it cannot be created in them by consent of parties, much less by the *laches* of a party, in neglecting to plead an available plea. *Glidden* v. *Elkins*, 219

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L

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in privately eloigning and converting them. *State* v. *Peter White*, 352

When goods are stolen, and the whole or part of them are found concealed on a person, it is *prima facie* evidence that he stole them, and unless he can show that he came by them honestly, must conclude him guilty of the theft. *State* v. *Cato Jenkins*, 379

When goods are lost, it is no excuse in the finder, who conceals or converts them, "*that he found them.*" It is his duty to advertise them. *Id.* 379

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When a question arises, what is a foreign law? if a written law, it must be produced, if an unwritten law, it must be proved, like any other fact, by the testimony of disinterested and intelligent witnesses. *Woodbridge* v. *Austin*, 367

Limitation.

When an infant is coupled in a judgment, as defendant, with others of full age, and error is brought by *all* after the expiration of a year from the judgment rendered, but within a year from the time the impediment of infancy is removed, the writ of error is not barred by the statute of limitations, but within the purview of the saving clause. *Priest and others* v. *Hamilton*, 44

When a demand is barred by the existing laws of a foreign country, where the contract was made, it cannot be revived by transferring it to an inhabitant of this state. *Woodbridge* v. *Austin*, 364

Libel.

No action can be maintained for a libel upon a petition for redress of grievances, whether the subject matter be true or false, simply on its being preferred to either branch of the general assembly, or disclosed to any of its members. *Harris* v. *Huntington, jun. et al.* 129

An action on the case for a libel will lie against two or more, if it be a joint act done by all. *Id.* 147

M

Misrecital.

If an indictment charges a perjury to have been committed before a justice of the peace, and misrecites the day of holding the court, the record may be read, especially if the misrecital be under a *videlicet*. *State* v. *A. Clark*, 282

Miscellaneous.

A special promise set forth in the plaintiff's specification in an action of *assumpsit*, cannot go to the jury in support of either of the counts in the declaration. But the court will hear arguments for the plaintiff *instanter*, or suffer a verdict to be taken for the defendant, subject to the opinion of the court, upon the rejection of the evidence; or the cause may be reviewed, at the plaintiff's election. *Sabin* v. *Grosvenor*, 248

N

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O

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P

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Upon the review of a cause decided upon demurrer, and resting on the same pleadings, the court will not prohibit the counsel from arguing it again. *Hazen et ux.* v. *Smith and Caswell*, 59

Pleading.

In an action of trespass for breaking and entering the plaintiff's house, and destroying his goods, against seven defendants, one of whom pleads *son assault demesne* in bar, and replication and issue to the country, and the other six plead, severally, the general issue, and all the issues go to the same jury, in the county court, verdict that he who pleaded *son assault demesne*, and three others are guilty, and the three other defendants not guilty, to whom the plaintiff pays their costs; on the appeal of the four found guilty, the supreme court ordered them to plead *de novo*. *Kenny* v. *Kettle and others*, 84

Departure in pleading. *Houghton* v. *Jewett and Martin*, 183

See Betterments. Probate.

Probate.

In an action in the name of the judge of probate upon an administration bond, where the bond is dated, and the writ tested, anterior to the passing the present act for the "probate of wills," &c. the judge of probate cannot be compelled to certify the name of the person applying to him to prosecute under the 103d section of the act. *Brush, Judge of Probate*, v. *House et al.* 87

In all appeals from the probate court, the court, as the supreme court of probate, will proceed conformably to the practice in that court, and subject the appealed cause to the rules of pleading which regulate the common law proceedings of the court. *Wadsworth* v. *Fassett, Guardian*, 127

When an appeal is taken from the decree of a judge of probate, upon the allowance of a guardian's account, the judge should cause the register of his court to certify a copy of such account, and send it up, with the copies, to the preme court, where objections may taken to its allowance in the nature a bill of exceptions, or exceptions t report of auditors. *Wadsworth* v. *F sett, Guardian*, 1

See Distribution of Personal Estate.

Promissory Note.

Where a promissory note is not negotiate by the custom of merchants, the endo see's interest in the note must be ma to appear, and the particular power the endorsor to transfer it must b shown. *Woodbridge* v. *Austin*, 3(

R

Recognisance.

See Debt.

Records.

Exemplification of the record of judicial proceedings in a foreign country, must be considered as *prima facie* correct; if incorrect, the *onus probandi* lies on the opposite party. *Woodbridge* v. *Austin*, 366

In a criminal prosecution before a justice of the peace, his record must show the place where his court *is holden*. *Brackett* v. *The State*, 167

Replevin.

When goods are taken in replevin, the plaintiff may show not only a *general property* which every owner hath, but also a *special property*, such as a person hath who hath goods pledged to him, &c. *Cushenden and Rutherford* v. *Harman, Board and Reynolds*, 435

In an action upon a recognisance, taken for the prosecution of a writ of replevin, where the redelivery of the property has been awarded, it is not necessary to allege in the declaration a *special* demand of the property replevied. *Id.* 438

Return.

See Habeas Corpus.

Review.

The court will not in future allow a review on a judgment upon a writ of error, although it had been formerly practised. *Enos* v. *Boardman*, 271

Revocation.

Upon a submission of controversies by bond, and revocation before award, made by deed, if the award be afterwards made, and it directs a certain sum of money, with the costs of arbitration, to be paid by one party to the other, and releases to be executed by both at a day certain, on the award's being pleaded in bar to an action for the demands submitted, and replication of the revocation pleaded to the award pleaded in bar, the plaintiff having paid the sums awarded, and the mutual releases not having been executed, such payments shall not be considered as a waiver by the plaintiff of the revocation of the submission. *Hathaway* v. *Strong, Porter, & Co.* 105

In all cases where there is a submission of matters in controversy to arbitrators by bond, whether the submission be made irrevocable or not, either party may revoke such submission before the award be made and published, and by such revocation he annuls all contracts as relative to the submission conditioned in the bond, and leaves the party injured by the revocation, to rest entirely upon the penalty of the bond of submission. *Aspinwall* v. *Tousey*, 328

S

Servant.

A servant is not accountable for an injury done to his master's beast, through his mishap, if he is engaged in performing any of the duties for which he was hired, and the animal is commonly used in such services, and the servant has exercised all the discretion in its use which common prudence required, although he can show no especial order by the master to use the particular animal. *Hathaway* v. *Smith*, 248

Set-off.

Where an action is brought against two upon their joint note, the individual demands of either may be pleaded in set-off to the note. *Ashley* v. *Willard and Hall*, 391

Sheriff.

A sheriff is not obliged to show his precept, either to the person who is to be arrested by it, or to the bystanders. *State* v. *Caldwell*, 214

See Escape. Evidence. Damages.

Slave.

No inhabitant of this state can hold a slave, and though a bill of sale, transferring a person as a slave, may be valid by the *lex loci* of another state or dominion, yet when the master *becomes an inhabitant* of this state, his bill of sale ceases to operate here, and cannot be read in evidence, to charge him with the maintenance of such person in sickness or the imbecility of old age. *Selectmen of Windsor* v. *Jacob*, 192

Slander.

In an action of defamation, the general character of the plaintiff cannot be shown in evidence by the defendant, in mitigation of damages. *Smith* v. *Shumway*, 74

In an action of defamation, for saying the plaintiff "*is a perjured rascal, and has taken a false oath, and I can prove it*," this being a direct charge of perjury, the defendant giving notice under the general issue, that he shall show the truth of the words spoken in justification, is held by the court to the same proof as would sustain an indictment for perjury. *Dwinells* v. *Aikin*, 75

In an action for slander, where a count contains words acknowledged to be actionable, coupled with others not actionable, but spoken at one time, the latter will be considered as merely in aggra-

vation, and the finding *entire* damages by the jury will not vitiate their verdict. *Chipman* v. *Cook*, 456

State's Attorney.

See Costs.

Statutes.

Statutes of the State, referred to, or interpreted, to wit,

Vermont Stat. vol. 1. p. 236. passed *February* 23d, 1797, 34
vol. 2. p. 348. 35
vol. 1. p. 173. Act passed *March* 4th, 1737, 38
vol. 1. p. 175. *ib.*
vol. 1. p. 73. 43
vol. 2. p. 409. passed *November* 6th, 1797, 46
vol. 2. p. 410. *ib.*
vol. 1. p. 53 c. vi. 59
vol. 2. p. 407. passed *November* 6th, 1797, 65
vol. 1. p 216. 69
vol. 1. p. 216, 217, 218. 70
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vol. 1. p 56. c. vi. s. 7. 74
vol. 1. p. 95. c. vi. s. 98. *ib.*
vol. 1. p. 94, 95. c. vi. s. 97. and first proviso, 75
Laws of *New-York*, *Greenleaf's* edit. vol. 1. p 445. 76
Vermont Stat. vol. 1. p. 95. c. vi. s. 97. 77
vol. 1. p. 269. c. xxxvii. 85
vol. 2. p 405 407. c. cx. s. 1 5. 86
vol. 1. p. 129. c. viii. s. 26. 88
vol 2. p. 70. c. lxxii. 89
vol. 1. p. 129. 90
vol. 1. p. 162. 91
vol. 1. p. 71. 100
Haswell's edit. p. 54. 101
vol. 2. c. cxi. p. 124. 102
vol. 2. p. 152. 103
vol. 2. p 53. *ib.*
vol. 1. p. 92, 93. 110. 113
vol. 1. p. 92, s. 92. 115
vol. 1. c. xviii p. 236. 116
vol. 1. p. 283. c. xxviii. s. 10. act relating to gaols and gaolers, &c. passed *March* 9, 1797, 125
vol. 1. p. 392. passed *Nov.* 6th, 1801. *ib.*
vol. 1 p. 68. 127
vol. 1. p. 151. 128

Declaration of Rights, *Vermont* Constitution, c. 1. act xx.
Vermont Stat. vol. 1. p. 45.
Constitution of *Vermont*, c. 2. s. ix.
Hough & Spooner's edit. of the Stat p 158 *Ib.* p. 81, 82.
Haswell's edit. State Stat. p. 271, 27
Vermont Stat. vol. 2. p. 53.
vol. 1. p. 78, 79. *I* 409.
vol. 1. p. 424. passed 27, 1801.
vol. 1. p. 178. s. 25.
vol. 1. p. 171.
vol. 1. c. vi. s. 73 p. 82,
Haswell's edit. of the Statutes, p. 27.
Vermont Stat. vol. 1. c. ix. p. 177.
vol. 2. c. lxviii. p. 52.
vol. 1. p. 177.
vol. 1. p. 30.
Laws of the *U. S.* vol. 1 17. art. 4. s.
vol. 2. p. 166.
p 18.
Vermont Stat. vol. 1. c. vi. p. 67. s. 33.
vol. 1. c. xxxiii. p. 353
5.
vol. 1. p. 101. passed *N* 5. 1801,
vol 1. p 280.
Laws of the *U. S.* vol. 1 p. 247. *Ib.* 162. *Ib.* p. 297.
vol. 1. p. 187.
Vermont Stat. vol. 1. c. x. s. 14. p. 19 195.
vol. 1. p. 353. c. 33. s. 2.
vol. 1. p 353.
vol. 1. p. 71.
vol. 1. p 333.
Haswell's edit. *Vermont* Stat. p. 28 passed *Oct.* 27th, 1791.
Vermont Stat. vol. 1. p. 90. vol. 2. 356.
vol. 1. p. 189. c. 10. s. 5.
vol. 1. p. 97.
Hough & Spooner's edit. *Vermont* Sta p. 40.
Fay's edit. of the Laws, Appendix, p. 38.
Vermont Stat. vol. 1. p. 189.
vol. 1. p. 209.
vol. 1. p. 341.
vol. 1. p 33.
vol 1. p. 55 *Ib.* p. 78.
vol. 1 p. 53. and 218. *Ib.* p. 215. *et seq.*
vol 2. p. 363.
vol. 1. p. 323.
vol. 1. p. 61.
p. 189.
vol 1. p. 307.
vol. 2. p. 231.

Supreme Court.

he supreme court will reverse an order made by them, when it is discovered and decided to be against an existing statute. *Clerk, Judge of Probate*, v. *Whitfield Foster and others*, 467

he court have no power to order a grand juror to withdraw himself from the panel in any particular case. *Baldwin's case*, 473

Surplusage.

See Declaration.

T

Torture.

rture to extort a confession of the truth from persons accused of crimes, contrary to the common law and constitution of *Vermont*. *State* v. *Hobbs and Strong*, 380

Travel.

an action at the suit of the state treasurer, the state attorney cannot tax costs for the plaintiff's travel. *Swan* v. *Colfax et al.* 258

Trial.

ien an indictment, which contains sundry counts, has been presented to the county court, against several defendants, and they are acquitted on all the counts but one, and appeal, although on arraignment they plead generally not guilty, the court will not compel them to go to trial on those counts on which they had been acquitted in the lower court. *State* v. *Kittle and others*, 471

Trial, New.

en the legislature, by a private act, grant a new trial, and make no mention of the term at which the action shall be docketed, it shall be construed to intend the next term after passing such act; and an adjourned term, when a stated term intervenes, shall not be considered as the next term. *Pearl* v. *Allen*, 314

When an action of fraud is brought against A. only, and B. is coupled with him in the declaration as a *particeps*, it is not material to the general issue, to show in defence, that the plaintiff had no knowledge of the defendant, and was not immediately defrauded by him, and therefore the exhibition of such evidence by affidavit, though newly discovered, is no ground for a *new trial*. *Robbins* v. *Windover and Hopkins*, 11

On motion for a new trial in a civil cause, the affidavit of one of the panel who tried it, cannot be read to show what passed in the jury-room during the deliberations of the jury whilst agreeing to their verdict. *Id.* *Ibid.*

The affidavits of any of the panel cannot, on motion to set aside a verdict, be read to disclose the deliberations of the jury-room. *Harris* v. *Huntington, jun. et al.* 147

See Voir Dire.

Trover.

Trover brought by an officer to recover for the conversion of property, attached by him on *mesne process*, against the surety of the defendant, who joined with him in executing an accountable receipt for the property, will not lie if the property is not demanded on the execution within thirty days after final judgment, if it has been delivered by the surety to the lawful owner, the principal in the accountable receipt. *Strong* v. *Hoyt*, 208

V

Verdict.

See New Trial.

Voir Dire.

A party on trial has his election to show the interest of a witness, by putting him on the *voir dire* oath, or by other proof; but he cannot avail himself of both modes of proof on the same trial. *Dorr* v. *Osgood*, 28

When a party on trial to the jury has elected to prove the interest of a witness by causing the *voir dire* oath to be administered to him, and he purges himself, and testifies in chief, the party shall not, on motion for a new trial, be admitted to show the interest of the witness by other proof. *Dorr* v. *Osgood*, 28

W

Witness.

A petit juror may be sworn, and testify, as a witness, of facts which he may know relative to the cause in issue; but he must not be asked a question, the answer to which may indicate his opinion of the merits of the cause. *Dunbar* v. *Parks*, 217

If a witness has considered himself interested in a cause when he is not, on being informed by the court that he is not, he shall be sworn and testify, and the jury shall allow for any possible bias in his mind, in weighing his credibility. *State* v. *A. Clark*, 278

A woman divorced *a vinculo matrimonii* is not a competent witness upon an indictment against her former baron, for a crime committed during coverture. *State* v. *Phelps*, 364

The interest which shall exclude a person from testifying, must be direct in the event of the suit; not a contingent, remote or possible interest; and, in all cases of doubt, whether the interest be direct or not, the court will admit the witness to testify, and submit his credibility to the jury. *Phelps* v. *Hall*, 399

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